DOCUMENT RESUME

ED 120 943 EA 008 102

AUTHOR French, Larry L.
TITLE The SECOND School Administrators Legal Handbook.
PUB DATE 75
NOTE 161p.; Handbook for the 1975 Oklahoma School Law Institute. For chapters of the document, see EA 008 103-112
AVAILABLE FROM University of Oklahoma College of Law, Continuing Legal Education, 630 Parrington Oval, Norman, Oklahoma 73069 ($12.00)

EDRS PRICE MF-$0.83 HC-$8.69 Plus Postage
DESCRIPTORS *Administrative Personnel; *Boards of Education; Collective Bargaining; Court Litigation; Elementary Secondary Education; *Legal Responsibility; Sex Discrimination; Student Publications; Student Records; *Supreme Court Litigation; Suspension; Teacher Dismissal
IDENTIFIERS *Oklahoma

ABSTRACT

This handbook is not necessarily meant to be a lawbook, but rather a manual to be used in the field prior to the need for a lawyer. It is specifically designed to assist the school administrator and the board of education in dealing with students, teachers, staff personnel, and patrons. It essentially updates many of the topics covered in the original handbook, specifically dealings with teachers, student due process and discipline, impediments, tort liability, and school board general recommendations. The handbook also covers collective bargaining, student records, sex discrimination and Title IX, and student publications. (Author/IRT)

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The SECOND School Administrators Legal Handbook

by: Larry L. French, Legal Counsel, Oklahoma State School Boards Assoc; Oklahoma Association of School Administrators; Oklahoma Association of Secondary School Principals; Cooperative Council for Oklahoma School Administration

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The 1975

OKLAHOMA SCHOOL LAW INSTITUTE

Moderated by

JAMES B. DOLMAN, Attorney, Ardmore

Friday, October 3, 1975

Program

8:45 a.m.	Registration-Forum Building, 1700 Asp Avenue, Norman
9:25 a.m.	Welcome-Dr. Leslie Fisher, State Superintendent
9:30-10:30 a.m.	NEW LEGISLATION Senator James F. Howell, Midwest City, Chairman of Senate Education Committee, Oklahoma State Senate
10:30-10:45 a.m.	COFFEE BREAK
10:45-11:15 a.m.	A REVIEW OF 1975 TEACHER LITIGATION Larry L. French, Chief Counsel, Oklahoma State School Board Association, Oklahoma Association of School Administrators
11:15-12:00 noon	GENERAL QUESTION & ANSWER PERIOD
12:00-1:15 p.m.	LUNCH - everyone on his own
1:15-2:00 p.m.	TITLE IX-SEX DISCRIMINATION REGULATIONS Beverly Ledbetter, University of Oklahoma Legal Counsel
2:00-2:45 p.m.	1974 PUBLIC COMPETITIVE BIDDING ACT WITH 1975 AMENDMENTS Mike Tinney, Oklahoma City attorney
2:45-3:00 p.m.	COFFEE BREAK
3:00-3:30 p.m.	GENERAL QUESTION & ANSWER PERIOD
	ADJOURNMENT

Each of the above speakers will lead off the discussion with a concise talk on the topic assigned. After the lead-off talk, a continuous panel consisting of Hack McDonald, J. Harry Johnson, Joe Lockhart, Larry French, and Marian Patrick will discuss the applicable law. Audience participation will be encouraged.

ABOUT THE AUTHOR.....

Larry L. French, a former Assistant Attorney General of the State of Oklahoma in charge of education matters, is Chief Legal Counsel and Negotiations Consultant for the Oklahoma State School Boards Association, the Oklahoma Association of School Administrators, the Oklahoma Association on Oklahoma School Administration. He is a partner in the law firm of Edwards & French, with offices in Seminole, Oklahoma.

He has authored "The School Administrator's Legal Handbook", published in 1972 by the University of Oklahoma Law Center, "Oklahoma Schoolhouse Law" published in 1973 by the University of Oklahoma Law Center, and "The Powers and Duties of an Oklahoma School District" published in 1974 by the University of Oklahoma Law Center. Additionally, he has written numerous articles for educational and legal publications. French is a special lecturer in school law with the College of Education, Graduate Division of the University of Oklahoma and represents Seminole Junior College, an accredited institution of higher education in the State of Oklahoma.

A graduate of the University of Oklahoma College of Law, he served as President of his law fraternity, President of his Senior Class and President of the Law School Board of Governors. He received the Student Bar Association Prize for outstanding contribution to the College of Law and the Phi Alpha Delta Award as Outstanding Senior Law Student. French is a member of the Seminole County, State of Oklahoma, and American Bar Associations and has been admitted to prac-

practice in the United States Supreme Court. He has served as President of the Seminole County Bar Association and was named as Oklahoma's Outstanding Young Lawyer in 1972 by the Oklahoma Bar Association. French has received national recognition as one of the prominent school law experts and represents a number of school districts across the State of Oklahoma. In addition to numerous lecture duties, he is a member of the National Organization on Legal Problems of Education, a member of the Executive Council of the National School Boards Association, Council of School Attorneys and is serving his second term as Secretary-Treasurer and Newsletter Editor of the Oklahoma School Attorneys Association.

A Naval Reservist, French holds the rank of Lt. Commander and is currently billeted as Administrative Officer of the Reserve Intelligence Unit stationed in Oklahoma City, Oklahoma. He is also State Coordinator for the United States Naval Academy Information Program and a member of several naval organizations.

INTRODUCTION

"SOMETHING ABOUT THE LAW AND THIS 'SECOND' HANDBOOK"

In 1972, by virtue of the able assistance of J. Dwain Schmidt, who until recently was the Director of the Department of Continuing Legal Education at the University of Oklahoma, the University of Oklahoma Law Center published "The First School Administrator's Legal Handbook.".

The initial handbook, basically, was the result of a talk given by your author to a group of school administrators at the 9th Annual Conference on Critical Issues in Education, which was held at Central State University on November 16, 1971. An article appeared in a Metropolitan newspaper the next day and is herein quoted:

> Recent high school challenges of authority may have begun to swing back in another direction on the pendulum of long school-boy hair, that is the opinion of Larry French, Assistant Attorney General, as expressed Tuesday at a meeting of Oklahoma Administrators. French told some 250 school men meeting at Central State University that most of the recent court rulings support the authority of school officials. Hair cases have about run the gambit, French declared, for the past few years about half the courts upheld the students and the other half upheld the administration, but most of the recent cases have seen courts rule for the schools. The legal experts cited a recent Texas longhair case in which the court held that by accepting an education at public expense students subject themselves to discretion of the school authorities as to the manner in which the student shall deport themselves." (emphasis mine)

Consider, however, that in the month of June, 1975, an Oklahoma District Court ruled that the dress code of one Oklahoma school district was unreasonable, vague, arbitrary and accordingly, unconstitutional.

School litigation has continued its growth and now covers a wide spectrum of controversies. School districts, however, are winning their fair share, but such represents an ever increasing need to exercise the original premise as dictated in the 1972 Handbook, that being "preventive litigation."

Federal intervention as to school district operations has been endless, as we have seen the implementation and enforcement of Title VII's EEOC Rules and Regulations, Senator's Buckley's HR69(Access to Student Records Act) and now Title IX's Non-Discrimination as to sex. Accordingly, it is presumed that the litigable issues of public education have expanded to a point where one wonders what type of issue will next surface. Twenty years ago, there was nothing within the law that even resembled a substantive educational issue. Although there were a few scattered school cases, such were of minor significance.

Then came Brown V. Board of Education and little did the Kansas community of Topeka realize that this integration matter would evolve as one of the major litigable issues in education for all time, changing a social doctrine so deeply imbedded in our tradition and heritage. Still today, the Topeka Board of Education is continuing to experience problems with the Federal Judiciary, as are a number of the communities across the country. Recently the United States District Court in Kansas ruled that it still retained jurisdiction over Brown V. Board of Education and indicated that the Department of Health, Education and Welfare's only function at this time was to bring to the attention of the court any facts it might have to the effect

that the Topeka School Board was not carrying out the order of the United States Supreme Court in Brown. HEW at this time has been reluctant to appeal the court's decision but is continuing negotiations with the local Topeka board.

The year of 1975 again has been a banner year relative to significant school law litigation. In this "Second" Handbook, much of the litigation that the United States Supreme Court has decided is discussed. In chapter two for example, the new student suspension system deals with the case of Goss V. Lopez, which, briefly,held that before a determination is made to suspend any student, that student is entitled to an "evidentiary hearing" to be conducted by a local school official. In chapter four the Board of Commissioners V. Jacobs case is discussed relative to the distribution of student publications. And again, in chapter three, school official personal liability is discussed pursuant to the United States Supreme Court decision in Wood V. Strickland. Also included within this handbook is an update on teacher terminations and in particular, a Federal viewpoint as to non-tenured teachers. Chapter five deals with Title VII EEOC Rules and Regulations as to temporary disabilities, i.e., pregnancy. Chapters eight and ten deal with additional Federal requirements as indicated heretofore, to-wit: The Buckley Amendment, otherwise known as HR69, and the new HEW rules and regulations implementing the requirements of Title IX.

Additionally, in Chapter seven an update and review of the negotiations scene in Oklahoma for the year 1975 is provided and Chapter

six emphasizes points and recommendations relative to the more efficient conducting of school meetings. Chapter Nine brings forth a very timely topic, the new Public Competitive Bidding Act as it has been amended by the 1975 Oklahoma Legislature. I might note at this time that Chapter nine was prepared by Mike Tinney, a bond attorney in Oklahoma City, Oklahoma, and Chapter eight was prepared by Beverly Ledbetter, Assistant Legal Counsel at the University of Oklahoma and I appreciate their participation in this Second Handbook.

As was indicated in the original "School Administrator's Legal Handbook," the handbook is not necessarily meant to be a lawbook, but rather a manual to be utilized in the "field" prior to the services of a lawyer becoming necesary. It is specifically designed to assist you, the school administrator, and your board of education in your dealings with students, tachers, staff personnel, patrons and other persons whom you may deal with from time to time. It essentially updates many of the topics covered in the original "handbook", to-wit: those dealing with teachers, student due process and discipline, impediments, tort liability and school board general recommendations.

I very much appreciate the extraordinary assistance provided to me by Sandra McConnell and her staff at the University of Oklahoma Law Center, in particular Helen DeBolt who edited the manuscript, my secretary, Elsie Rabiee, and the many school administrators and board members with whom I have had the opportunity to work over the past five years. The continual input on the part of the professional educator is extremely helpful to intermingle the legalistic point of

view with the practical "on-the-job" point of view.

During the course of this year, I have observed tremendous pressures and frustrations towards boards of education and their respective administrators. These pressures have come not only from teachers, students and parents, but patrons within the community who attend board meetings when there is controversy afoot.

A recent District Court decision in Lincoln County, State of Oklahoma, whereupon the Judge held for the Board of Education, emphasized that patrons are too quick to seek redress to the Court systems of this country over to disagreements with their elected officials, i.e., board of education members. The Court clearly indicated that the election process so provided is the appropriate way to deal with dissension anddisagreement as to the performance of those elected officials as opposed to coming into court and complaining whenever one disagrees with a policy decision. Typically, supporters of the local board of education stay away from board meetings and fail to assist in representing the view point as to the discretionary judgment of their elected local board of education.

Operating a school system in these days and times, requires a substantial progressive public relations program. The public must be informed as much as possible as the varied requirements, both State and Federal, which are imposed upon local boards of education in the school districts which they represent. The typical patron has no idea what is required in order to terminate a teacher. The local taxpaying patron, additionally, has no idea as to what is involved in

operating a school system and being in compliance with the various and numerous rules and regulations promulgated by our State legislature, our Federal Congress and our own State Department of Education, not to mention the district's own rules and regulations which it is required to implement and enforce. It is further typical that most staff personnel, both certified and non-certified, are uninformed as to the duties and responsibilities of their management administration, and the important fact that the eventual responsibility lies in only one place, the board of education.

In recent months we have seen some boards becoming plaintiffs in lawsuits, as opposed to always being the defendant. Certainly, one would not want to bring a lawsuit unless there were some merit, but it is important to consider that boards of education are not necessarily sitting back now and waiting for a lawsuit to be filed. More positive action is being taken and an approach relative to affirmative action is being implemented. Additionally, many boards have implemented public relation programs to inform the public of positive items in which the board is involved.

It must be remembered that a board of education acts in three capacities, i.e., legislative, executive and quasi-judicial. Pursuant to its legislative function, it promulgates rules and regulations. Pursuant to its executive function it enforces said rules and regulations; and pursuant to its quasi-jucicial capacity it conducts hearing and makes determinations, many of which are discretionary as to individual matters involving teachers, students, etc. A board of

education must rely heavily upon its chief executive officer, i.e., the District Superintendent. We have seen our principals being drawn into the management area and thereupon requiring additional duties from these administrators. We have additionally seen non-teaching certified personnel collect themselves more in the management area as opposed to the area of labor.

Conclusively then, legal assistance continues to be a vital part of school district's operation. Today, a Board of Education can ill afford to operate without "expert" source products. To emphasize a point, the U.S. Supreme Court case of Wood V. Strickland has been termed "the lawyer's full-employment case".

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Chapter 1

TEACHER TERMINATION: REVISITED

A school administrator today must be cognizant as to the certified instructor's employment relationship within the public school district structure. Typically, the immediate superior to the certified instructor, who is responsible for the documentation of evaluations and subsequent recommendations as to re-employment and/or termination, is the school administrator.

An effective administrator today not only handles complex administrative tasks, but must be capable of assuming the major responsibility for developing and directing a strong and effective evaluation program. Further, he must be prepared, at the appropriate time, to espouse a recommendation relative to the continued employment of certified personnel. Such a task is not one that can be effected immediately prior to the spring board of education meeting at which time employment contracts are determined, but rather, evaluation requirements and documentation as to a teacher's performance constitutes a continuing and never ending process for which, typically, the school administrator is responsible.

Obviously, in this regard, the administrator must be informed as to the legal implications regarding the applicability of due process to teacher tenure and certain constitutional principles as have been dictated by our Federal Courts. It goes without saying that teachers with an established record of competence should not be idly

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dismissed. On the other hand, a teacher with an established record of incompetence should not be permitted to continue his employment in the school system. To effectuate the latter, detailed documentation in a continuous and effective fashion must be accumulated relative to the teacher's performance. The eventual result which would cumulate all pertinent factors concerning employment rights and responsibilities, would be that of the written contract of employment, a document which is typically taken "lightly" by school administrators, but in actuality, constitutes(including school board minutes) the most important documentation which the school district effects within the course of the fiscal year.

Statutorily speaking, the school administrator must be informed as to those state laws which provide rights and remedies relative to the employment of certified personnel. Each state varies as to such requirements. However, most jurisdictions provide for a probationary period which provides the school administrator with an opportunity to observe the performance of the employee. The employee is normally regarded as a "non-tenured" employee and as such, is not entitled to be re-hired, as would be the "tenured" teacher. Such distinction was clearly indicated in the case of Board of Regents State Colleges et. al. V. Roth, (408 U.S. 564, Wisc. 1972), wherein the United States Supreme Court clearly distinguished the status of non-tenured and tenured employees.

The purpose of any probationary period is to provide an opportunity for the employer to observe the employee for a reasonable period

of time in order to determine the value of that employee's service, and in the case of eventual attainment of tenure, to make an accurate and correct determination as to the awarding of tenure, pursuant to the particular provisions of the state statute involved. If such opportunity is denied the employer, the result would be to invalidate any distinction between the so-called probationary employee and the employee who has attained certain procedural rights pursuant to the attainment of tenure.

Often a confusing intervening force relative to said probationary period is that of the "continuing contract law." Almost without exception, political subdivisions are limited to the expenditure and/or obligation of public monies for the current fiscal year. In the case of certified personnel, because of their unique work period, most states provide constitutional permission to determine employment contracts and thereby obligate public monies prior to the commencement of the ensuing fiscal year. The continuing contract law is written in such a fashion as to indicate that the employee will be automatically re-employed unless notice is provided by a specific date. In actual practice, each employee's contract is determined at some time during the course of the spring semester and if he is to be re-employed, a new contract is prepared and executed indicating the contract year upon which the employment is based and the appropriate stipend involved. Some continuing contract provisions are nothing more than "teacher tenure" laws, which, within their scope, provide for a specific period of probation and in addition, provide those

procedural due process rights applicable after the probationary period has been completely and continuously served to the satisfaction of the employer.

Many jurisdictions provide for various types of contracts,i.e., administrator, temporary, replacement, duration of need, substitute, extra duty, etc. The school administrator should closely examine those provisions relating to the type or types of contractual agreements authorized by law. Typically, a school district will promulgate and execute a contract, thereby providing vested rights to the parties involved and upon examination, the contract in question will not be one authorized by law. Further, there are certain duties typically found within the public school system for which there is no requirement of a contract to substantiate same, i.e., coaching, band directorships, club sponsorships, security duties, monitoring duties, etc.

The contract exists as a workable document and many necessary and appropriate terms should be included therein. Many school districts prefer the utilization of a "form" contract, but as such, the "form" fails to provide terms of employment that may be acted upon, enforced and relied upon at a future time. Further, such "form" contracts create the impression that they have not really been reviewed by both parties and for this reason they may not be considered in an actual controversy, whether it be administrative or in a court of law.

Aside from basic information such as contract salary and applicable

increments added for additional services, any publication such as a faculty handbook or something similar should be "incorporated by reference" into the contract. Additionally, there is a distinction between the contract employment year and the contract work year and these particular terms should be clearly indicated in the contract, even though the basic contractual term of employment is the normal fiscal year.

As indicated, the employment status of teachers is normally classified as either probationary (non-tenured) or tenured. A teacher with probationary contractual status is employed for a trial period during which time the district evaluates his performance. The probationary teacher in this sense has minimal job security because he can be terminated at the conclusion of the academic year, if it is determined that such termination is in the best interests of the school district and is based upon some reasonable justification. Typically, the probationary teacher is not entitled to any official written statement of cause, nor a hearing or other procedural protections usually afforded tenured teachers. Obviously, the "best interests" test is not applicable to the termination of a tenured teacher. The tenured teacher can be dismissed and/or non-renewed only "for cause" pursuant to the reasons delineated in the applicable tenure statute. All other employees,i.e., those non-certified, including, but not limited to secretaries, maintenance personnel and specific board appointments, such as attorneys, architects and accountants, serve at the pleasure of the board of education and can be released at the board's discretion since

such occupations have no claim to tenure or other guaranteed benefits, terms or conditions of employment. A board of education, however, does have the authority to contract with these employees and upon doing so, the terms of the contract would govern any vested rights which would accordingly accrue.

Generally, a school board's dismissal of a tenured teacher which is supported by substantial evidence cannot be disturbed, Toups V. Authement, 496 F.2d 700 (5th Cir. 1974). Typically, the "sufficient evidence" test is applicable to the termination of any tenured teacher who challenges her non-renewal or immediate discharge. The "sufficient evidence" test is a question of fact to be determined by the local board of education and/or redetermined by a subsequent administrative review board; then, the test before the courts would be whether or not the determination as rendered was in accordance with the evidence as presented.

An initial difficulty is always that of establishing proof to support "causation." Most statutory causes defy logical and reasonable interpretation. Terminology such as incompetency, inefficiency, willful neglect of duty, immorality, insubordination, etc. are extremely difficult to define in their proper perspective relative to the evidence that is available to support such charges. Initially, the evidence must be classified as to which cause it supports, then the burden of proof is twofold: (1) to establish that the cause so alleged is the proper one and is defined as that which the termination supports; and (2) whether or not the evidence presented is sufficient to support

that particular cause. Typically, failure to provide sufficient evidence results in reinstatement in accordance with applicable remedies and there is the possibility of an award of damages in a court of law. The majority of litigation in regard to the termination of teaching personnel has been as to non-tenured teachers, because the state tenure laws that usually provide administrative remedies are typically available to the tenured teacher but not to the non-tenured teacher.

Such administrative remedies usually require as a minimum adequate notice, including a statement of the cause or causes for non-renewal, and an opportunity for a hearing to be conducted before the local board of education. Further, typical state tenure laws provide appellate procedures administratively, i.e., review of the matter before administrative review boards as well as proceedings before the State Department of Education or Commissioner of Education. Administrative procedure acts typically provide for a review by the courts of any act of a state agency so court review would be applicable at that point in time, but such court review is rarely used. Administrative appellate remedies vary from state to state, but there has been a tendency in recent years to remove the determination from the auspices of the local board of education and/or any so-called teacher review panel, and place the determination in the hands of a neutral hearing examiner or fact-finding committee, subject to review and/or appeal to a local court of law. Non-tenured teachers, conversely, remain with but one remedy and that is the Federal District Court to challenge their termination on the basis of a constitutional question, see Powers V. Mancose School

District, 369 Supp. 648(U.S.D.C.D. Colo. 1973).

When a school district terminates a tenured teacher, the law essentially places the "burden of proof" upon the administration to sustain its action. When a school district terminates a non-tenured teacher, then the "burden of proof" rests upon the teacher to prove a constitutional violation; but the unique aspect of such a federal challenge is that it operates to "shift the burden" to the administration to "justify" its action, although the state statute does not require any "statement of reasons" to accompany the issuance of the "notice of non-renewal." For example, once the teacher has alleged that he was dismissed because he exercised his freedom of speech, as guaranteed by the First Amendment of the U.S. Constitution, then it becomes the burdensome task of the administration to say, "No, that is not the reason...this, however, is the reason..." Consequently, although the state tenure law does not require an official reason, the federal remedy requires one to offset the teacher's challenge.

Consider what was said in Roth:

> "When a violation of First Amendment rights is alleged, the reasons for dismissal or for nonrenewal of an employment contract must be examined to see if the reasons given are only a cloak for activity or attitudes protected by the Constitution."

Ironically, this statement was made by Justice Douglas in his dissent; but in the course of non-tenured lawsuits today, the dictate of Douglas rings true. The Roth majority, however, held that a non-tenured teacher is not entitled to a statement of reasons. Accordingly,

then, how does one explain the "burden shift" heretofore noted? One obviously cannot, except to say that "the law works in strange and wonderous ways."

The recent case of Powers V. Mancos School District illustrates our perplexing problem. A non-tenured teacher challenged his non-renewal in a federal civil rights suit alleging a violation of his rights under the First and Fourteenth Amendments. The court held that the teacher had stated a claim upon which relief could be granted, but at the same time held that because he had not attained tenure, he did not have a constitutional right to a statement of reasons and a hearing. Assuming the former, however, the latter will materialize in court.

What has happened to the concept of "probation?" It has been historically urged that the school district administration is entitled to a certain period of time in which observation of the new employee is expected and encouraged. These "probationary" periods vary from state to state ranging from one year to five years depending upon statutory dictate. Any nonrenewal arising therefrom has been classified as "in the best interests" of the school district. The "best interest" test, at best, has fallen asunder pursuant to the federal remedy now available.

It is no longer sufficient, nor would there exist "justification for nonrenewal," to merely defend on the basis of "best interest." Exactly what degree of "justification" is required is not known. One could assume, however, that "justification" would be somewhat less than those statutory grounds required to justify the termination of a tenured

teacher, but something more than the "best interests" doctrine.

What a board of education must do, then, is to assure that "reasonable justification" is present and to act upon that justification as recommended by the administration when non-renewing a non-tenured teacher's contract. Further, during any "informal" conference that the administration has with the teacher, such "justification" should be detailed to the teacher and the conference fully documented. Beware that the presentation of official reasons, prior to any court order, could result in the teacher being entitled to a hearing so as to "rebut" those reasons. It is one thing to be required to "justify," but another to be held in violation of due process due to the failure to provide a hearing.

The non-tenured teacher plaintiff is unique, in that, at the same time he is urging he be given official reasons for his non-renewal, he is arguing that the board's subsequent relinquishment of the "reasons" has so severely damaged his future employment opportunities that he is now entitled to monetary damages. In this regard, however, a recent 7th Circuit decision, Shirch V. Thomas, 486 F.2d 691, 1973, held that on behalf of the board even though "nonretention" itself standing alone, made the teacher less attractive to other employers. Assuming this to be true, the "making Public" of "formal charges" would obviously solidify such "non-attractiveness." Further, consider the teacher's salability when adjoining districts learn of the teacher's federal court challenge. Logically, would any administrator hire a teacher who has just sued his colleague?

Conversely, in Pelisek V. School District of Kenosha, 371 F.Supp. 1064, 1974, the Wisconsin Federal District Court held that when the board of education announced its intention "publicly" not to renew the teacher's contract in such a manner as to reflect upon his reputation and good name and to foreclose future employment opportunities, such was sufficient to raise a due process question. As a practical matter, however, the current and continuing "over-supply" of teachers will solidify the teacher's choice in pursuing a remedy in court in hopes of reinstatement at least, and/or damages as well. Consequently, the possibility of "resignation," unless "perfected" in a timely and appropriate manner, will become something barely remembered.

Teacher organizations continue to work diligently, not only for reduction of, but for total abolishment of the probationary period. Administrators, on the other hand, are hesitant to rehire teachers when renewal will accrue "tenure." The outgrowth and continued pursuit of the non-tenured teacher's federal court challenge tends to make both efforts fruitless to a certain degree. Regardless, while the tenured teacher enjoys his remedy in State Court, the non-tenured teacher is enjoying his in Federal Court and will probably continue to do so, much to the administration's "chagrin."

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Chapter 2

THE NEW STUDENT SUSPENSION SYSTEM

In Goss v Lopez, 95 S.Ct. 729 (Ohio, 1975) the issue involved the suspension of Dwight Lopez and others from Central High School in Columbus, Ohio. Lopez had been involved in a demonstration on school grounds. The Ohio Statute provided that the Principal could suspend any student from school for not more than ten (10) days. The parents were to be notified and the student had a right to appeal the suspension to the Board of Education.

The Supreme Court held in a 5-4 decision (Mr. Justice White writing the majority opinion and Mr. Justice Powell the minority) that before a student is suspended for any length of time, the student and his parents must be provided notice, provided an opportunity to review and present evidence and an opportunity to respond to the charges at an evidentiary hearing conducted before a school administrator.

The Court indicated that the hearing, which is to be informal in its nature, must be something more than just a "parental conference" but may be something less than a formalized due process hearing. The Court further indicated that a certain amount of "give and take" should be present during the hearing.

The Court did exempt those situations where it is necessary to immediately remove the student from the premises for emergency reasons,

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but in such a case, a determination must be made within 72 hours of the removal. Otherwise, the student remains in school until such time as a determination has been made by the school official.

Lopez actually followed the dictate of Pervis v. LaMarque I.S.D., 466 F.2d 1054 (5th Cir. 1972) which the Oklahoma jurisdiction has followed in holding that when any student is suspended for a period exceeding three days, then an evidentiary hearing must be held prior to the suspension being effected. The only exception to this policy would be where the student's continued presence on campus will cause disruption. In such an instance, he could be sent home, but follow-up action must occur within twenty-four hours of the "emergency suspension".

The District Court of Oklahoma County has held that pursuant to Title 70, Oklahoma Statutes, Section 24-101 (Oklahoma's student suspension statute), any student who is suspended is entitled to an appellate remedy regardless of the length of suspension. The Court did say, however, that in the case of a three day suspension or less, the school district would not be restrained from administering the punishment pending any appeal therefrom, although such would tend to "moot" the appeal in the final analysis.

School districts are inquiring as to procedures to be utilized in operating their student disciplinary program. In this regard, in "THE POWERS AND DUTIES OF AN OKLAHOMA SCHOOL DISTRICT", (OU Law Center, 1974) it is emphasized that the first step to be taken in

promulgating a procedure is to assure that the school district has a "student conduct code" published and distributed to its students and parents.

Secondly, upon a charge being made, a determination must be made by some school official who previously knew nothing of the factual situation. In this regard, notice must be provided the student and his parents as to what the charge is, who brought the charge and when the evidentiary hearing will occur. Evidence may be provided by written statements of witnesses in lieu of the actual presence of student witnesses, (see Boykins v. Fairfield Board of Education, 492 F.2d 697 (5th Cir. 1974)). The school official's decision should exist as the initial decision and the student and parents notified as to what the decision was and as to their further appellate rights pursuant to Section 24-101. Additional appeal procedures will depend upon the particular school system, but pursuant to Section 24-101, an appeal may always be lodged with the Board of Education.

A School official's determination of punishment may be based upon the student's "record", but if so based, then such should be clearly indicated in the notice of decision issued to the parents. More often than not, a parent's challenge of a suspension will go towards the extent of punishment rather than to the finding of guilt.

The "principle of Lopez" emphasizes that once a state has chosen to extend the right to an education to students generally, then that state may not withdraw that right on grounds of misconduct, absent

fundamentally fair procedures to determine whether the misconduct has in fact occurred; and further, the state must recognize a student's legitimate entitlement to a public education as a property interest that is protected by the due process clause. Such may not be taken away for misconduct without observing minumal procedures required by said due process clause.

In Lopez the decision was split (5-4), the dissent being overly concerned that the majority unnecessarily opened the avenues for judicial intervention in the operation of the public schools that may well affect adversely the quality of education. The majority, however, was concerned when it stated as follows:

> "We stop short of construing the due process clause to require, country-wide, that hearings in connection with short suspensions, must afford the student the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge or to call his own witnesses to verify his version of the incident. Brief disciplinary suspensions are almost countless. To impose in each case even true truncated trial-type procedures, might well overwhelm administrative facilities in many places and by diverting resources, cost more than it would save in educational effectiveness."

Further, the majority provided certain discretion within the administration, but indicated that more formalized procedures could

be utilized in more difficult cases, and that the type of evidentiary hearing being required by the court would be forestalled when the disciplinarian hearing the matter had himself witnessed the conduct forming the basis for the charge.

So the court is saying, essentially, that prior to the imposition or any suspension, an informal hearing must occur in which the student so charged has the opportunity to present his side of the controversy and thereupon, receive a fair determination and if found guilty, a fair and reasonable imposition of punishment. As a practical matter, until the school disciplinarian hears the matter, he will not know the appropriate punishment to levy. Accordingly, past practices of imposing three day suspensions without a hearing seem ludicrous, in that a student has not had an opportunity to respond to, and possibly disprove, the charge.

Accordingly, it would be recommended that upon receiving information as to an alleged violation of student rules and regulations, the appropriate school official should immediately give notice to the student and his parents in writing, relating to the specific charge or charges and the known evidence supporting such charges and then set down an informal proceeding to be heard by a school official who has no prior connection with the alleged incident as soon as practicable (hopefully within three days of the time of the alleged incident.) Pending this "hearing", the student will remain in school unless his continued presence on campus endangers either himself or others or

school property. In such case, he can be removed, but recalled for a determination hearing no later than 72 hours after removal.

The Lopez decision did not deal with appeals. In Oklahoma, our statute provides an appeal from any suspension to the Board of Education. Once the evidentiary determination is made and punishment imposed, if an appeal is contemplated such should be ascertained at that time, then once again the student must remain in school until such time as his remedies have been exhausted, unless certain "emergency conditions" exist and are accordingly documented.

The forerunner of any effective set of procedural rules, in regard to "student conduct", exists as the "Student Conduct Code" itself. A student must be made aware of, and thereto provided notice as to any restrictions and/or prohibitions upon his conduct while present on the school campus.

As is true with any prohibitive regulation, the drafting of same proves to be a difficult task. In the drafting of such rules, one must be specific enough to ensure proper notice is provided as to said restriction. At the same time, however, one must be cautious not to severely limit the rule in its coverage so as to inadvertently provide a "loop-hole" within the conduct rule.

Certainly, the statutory prohibitions, such as the "Dangerous weapons - Dangerous substances Act" (Title 70, O.S. Section 24-102) should be included and the statutory reference cited. The Oklahoma School Code provides additional authorities as that dealing with

secret societies (Title 70, O.S. Section 24-105), those dealing with flags (Title 21, O.S. Sections 375 & 372), those dealing with removal from school property (Title 21, O.S. Section 1376), and those dealing with truancy (Title 70, O.S. Section 24-120). Additional "rules of conduct" should be classified under appropriate topic headings for easier referral purposes.

In the drafting of such rules, care should be taken not to utilize descriptive words which somehow "defy" logical interpretation, i.e. "vulgar", "hippy", "disrespect", etc. When in doubt, a definition could be included. Further, each rule must be nondiscriminatory on its face and within its application.

One cannot enforce a rule which is not in documented existence, i.e. the rule must be in writing and be distributed to all parties who are to be subject to such rule, including the parents. Further, when preparing a particular violation charge, the particular rule involved must be cited and care should be taken to assure that the proper rule is utilized. The student and his parents must be made aware of the specific rule alleged to be violated so that they can adequately prepare their defense, if any.

A popular term used today is "Students' Rights and Responsibilities". Merely listing a number of "don'ts" does not necessarily promulgate an effective "Student Conduct Code". Attention, then, to their "rights" as well as to their "responsibilities", should assist in the providing of a fair and reasonable "Code of Conduct".

A word of caution. The primary authority within the Oklahoma School Code for the suspension of students is found in Title 70, O.S. Section 24-101. That particular section indicates that "Any pupil who is guilty of immorality or violation of the regulations of a public school...", such being the school district's basic authority for suspensions assuming the district has promulaged such "regulations". Without a regulation, there can be no suspension. Further, without procedural rules being effected, there can be no suspension. One should remember that "procedure" has nothing to do with the so-called "merits" of a case. It means that, regardless of the seriousness of the violation and the amount of evidence supporting "guilt", if proper procedures are not utilized, then the "merits" of a case are worthless.

Certain cases that have been handed down relative to student problems during the course of the last school year include many interesting premises. In a case arising in Dade County, Florida (Ingraham v. Wright, 498 F.2d 248 (a 5th Circuit case dated July 29, 1974)),now pending before the United States Supreme Court, the Circuit Court, after initially saying that an executive officer of a board could be sued as an individual under the Civil Rights Act of 1971, held that corporal punishment deserves Eighth Amendment scrutiny, but under the circumstances of the case, the amendment dealing with cruel and unusual punishment was not violated. The court was willing to state that if the board policy concerning punishment was

constitutionally valid and was challenged, the use of the policy on a district wide basis would be narrowed to specific usage in individual schools. Essentially then, the Circuit Court has held that corporal punishment is constitutional if utilized in a reasonable manner and under controlled and documented circumstances.

In a student case which the Tenth Circuit Court of Appeals ruled upon involving an Oklahoma matter, the student had claimed his constitutional rights were violated in four areas: (1) dress code regulation; (2) expulsion from school; (3) compulsory attendance laws and (4) permitting religious services to be conducted upon the school premises. In Hatch v. Goerke, 502 F.2d 1189, (10th Circuit, 1974), the Tenth Circuit initially relied upon the case of Freeman v. Flake, 448 F.2d 258 (10th Circuit, 1971), and held that a school district was empowered to promulgate a reasonable dress code regulation and although at the time Lopez had not been handed down, the Court felt that pursuant to the suspension (which was never factually determined), the student would have been entitled to a hearing. The Court upheld the constitutionality of Oklahoma's Compulsory School Attendance Law and the factual determination as to the religious issue question was never determined.

As to Lopez's application in the area of the extracurricular activity of interscholastic athletics, a recent decision in Pennsylvania (Dallam v. Cumberland Valley School District, 391 F. Supp. 358 (M.D. Pa., 1975)) held that Lopez did not create an avenue of judicial

intervention into the basic daily discretionary activities of the public schools. In reaching its decision the Court relied upon the cases of Mitchell v. Louisiana High School Athletic Association, 430 F.2d 1155 (5th Cir. 1970) and Oklahoma High School v. Bray, 321 F.2d 269 (10th Cir. 1963). The Mitchell case was quoted:

> "The due process clause of the Fourteenth Amendment does not guarantee a citizen from every injury at the hands of the State, only those rights, privileges and immunities that are secured by the Constitution of the United States or some Act of Congress are within the protection of the Federal Courts. Rights, privileges and immunities not derived from the Federal Constitution or secured thereby are left exclusively to the protection of the States. The privilege of participating in inter-scholastic athletics must be deemed to fall in the latter category and outside the protection of due process."

Essentially, the Court concluded that there existed no constitutionally protected property interest in competing for a place on a high school athletic team.

In Texas (Taylor v. Grisham, U.S.D.C.W.D. Tex. No. A75CA13, February 24, 1975) two students were questioned concerning the smoking of marijuana and their car searched by the police. The two students

were not advised of their rights by the police officer who searched and questioned them; the students admitted that they were smoking marijuana to the police and to school officials who were notified later by the police. The students were suspended from school according to policies and rules of the board, the oral policy of the principal allegedly providing for an automatic suspension if a student was caught two times in some drug related offense. In its decision the Court found all of the above items, plus others, questionable, and issued a Memorandum Opinion and Order which stated in effect that the student plaintiff would win his case and ordered the students reinstated to their classes. The board's policy was declared unconstitutional on the grounds of vagueness. Once again, it is emphasized that so-called oral or unwritten regulations are no better than worthless when tested in a court of law.

The premise of Goss v. Lopez and the anticipated forthcoming edict of Wood v. Strickland,(95 S.Ct. 992, Ark., 1975), relative to procedures for long term suspension would seem to disrupt the very nature of discipline in our public schools. Quite possibly, the eventual answer to student suspensions will be "alternative educational programs" whereby, regardless of the violation and subsequent finding of guilt and imposition of punishment, a student will not be denied the opportunity, on a volunteer basis, to continue his education under certain restricted and conditioned circumstances.

Administrators will argue that suspensions are certainly not

"cure alls", but in those districts where there are no alternatives available, nor the financing for same, suspension often times exists as the only remedial punishment available. There also will continue to be the question as to how one's rights under our Compulsory Education Laws are effected when a student is forced out of school and accordingly not permitted to attend and comply with the Compulsory Education Laws.

Every state offers a free public education to its children. The Equal Protection Clause of the Fourteenth Amendment says that once a State offers any privilege or right to its residents, it must offer this privilege equally to all or have some rational basis for denying it to certain groups. Suspensions constitute a denial to "certain groups", or in other words, to that student who has violated a rule or regulation. It is obvious that when a child is suspended from school he is deprived of an education for whatever period of time the suspension is effective. The obvious reasons always for such denial are his behavior and the need for discipline in the schools. Once the right is established, then one cannot be denied that right, except upon proper cause. The same applies to teacher tenure rights and obviously the same applies to the student who has been provided his right to a free public education in our State school system.

The student also finds protection in the due process clause of the Constitution. Such is to say that it is not enough to simply allege a violation, but certain procedures must be effected in carrying out the process to assure that a student who is charged

with such violation receives every opportunity to respond to the charge, defend himself and essentially contest and/or challenge said allegation. Among other things, the State is constrained to recognize a student's legitimate entitlement to a public education as a property interest, which is protected by the due process clause and which may not be taken away from him without adherence to the minimum procedure required by that clause. The extent of any so-called due process hearing is governed by the circumstances and interests involved in each situation In cases involving serious deprivations, or in other words, extended periods of time of suspension, more complete and extensive procedural safeguards are necessary. Accordingly, if an administrator notes a serious offense he can anticipate that if guilt is found, an extended suspension will be awarded. At that time, the administrator must pursue a more extensive and effective procedure for processing the particular case at hand.

Another item of consideration which does not occur too often, is the student who is under a suspension, but may apply for readmittance prior to the running of the total suspension period. Accordingly, he might be entitled to a hearing whenever he makes a prima facie case that he is being deprived of an education without sufficient cause, i.e., his behavior has changed. At the hearing, the student should be given the opportunity of showing that he no longer poses a threat to the school system. If he can successfully do so, he should no longer be denied an education. Although school officials will

probably see many difficulties in implementing such an idea, most of the problems are easily resolved. Obviously, the school system must be interested in rehabilitation and must be willing to permit reentry to the school upon proof being shown by the student and/or his parents, that he is in fact rehabilitated and exhibits a desire and intent to return to school under proper controlled circumstances (probation-perhaps). Obviously, the school could demand that the student come forward with some type of minimal proof of this new attitude. In most cases the word of the student would need support from other sources, i.e., guidance counsellor, court worker, minister, etc.

Communication continues to be the byword relative to all student suspension problems. Typically, we say that unless exclusion from school is anticipated, then there is no need for procedures. This is not necessarily true. We can anticipate that the Ingraham case cited heretofore at p. ____, may well require certain procedural due process relative to the administering of corporal punishment. The same may well eventually apply to detention time and other remedial punishments administered in our public schools today.

Wood V. Strickland cited previously on p._____ may eventually hand down an edict that will set out specific procedural requirements, as well as substantial requirements as to what are typically termed "long term suspensions". Suspensions longer than ten days, are those being considered long term. Lopez only dealt with suspensions up to and including ten days or "short term suspensions". Obviously, each proposed suspension case must be treated as an individual matter and

determined accordingly. More than likely 80 to 90% of all disciplinary situations will be resolved as they have been before, in a unitary and summary fashion; but there will be those 10 to 20% of cases where there is a "reasonable doubt" as to what has actually happened and whether student so charged is actually the one to blame. These are the ones with which the courts are concerned and obviously the ones which school administrators must note, and in which they must take proper substantive and procedural steps to assure implementation of fair and impartial decisions which the courts can support in the final analysis.

ED120946

Chapter 3

SCHOOL OFFICIAL LIABILITY: WOOD V. STRICKLAND

On the 25th day of February, 1975, the United States Supreme Court issued its Opinion No. 73-1285 found in 95 S. Ct. 992 (Ark. 1975) the case of Wood V. Strickland, which involved Arkansas high school students who had been expelled from school for the violation of a school regulation prohibiting the use or possession of "intoxicating" beverages at school. There were essentially two questions before the Supreme Court: (1) Whether or not the students concerned were provided their constitutional procedural and/or substantive due process rights and (2) Whether or not a school official, be he board member or administrator, can be held personally liable pursuant to Title 42 U. S. C. Section 1983.

Briefly, the history of this litigation involved three high school girls who had admitted that they poured two bottles of beer into a soda pop punch served at a school party. There also existed an inference, that because the County in which the school was located was a "dry" county, the girls were forced to drive across state line to purchase the beer. Further, there was the interesting question of whether or not the mixture, of which the girls concocted, was in fact "intoxicating" as prohibited by the school regulation.

After conducting a board meeting "ex parte", the board subsequently met again, with the girls, their parents and legal counsel present. Although the girls admitted "spiking" the punch, they primarily were contesting the severe punishment sanctioned by board rule. The

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School Board refused to change its mind and the girls remained suspended. They then filed suit in Federal Court and although the case was tried before a jury, the jury was unable to reach a verdict. The Judge then directed a decision in favor of the school board on the basis of "immunity." The girls appealed that case to the 8th Circuit, which ruled in the girls favor, the Appellate Court finding that the facts showed a violation of student rights as to "substantive" due process, in that the school board had failed to show that the mixture which the girls had put together was indeed "intoxicating." Subsequently then, the Supreme Court agreed to review the case. The High Court did not determine the question as to procedural due process, finding instead that the lower court should determine whether the girls had been thrown out of school without due respect for their constitutionally protected rights. Accordingly, a procedural due process question remains in that the District Court did not discuss such issue and the Court of Appeals did not decide it and the High Court preferred to have the Court of Appeals consider the issue in the first instance.

As to the immunity doctrine, however, and the question of "individual liability," the Court did specifically hold <u>that a school board member is not immune from liability for damages under Section 1983, if he knew, or reasonably should have known, that the action he took, within his sphere of official responsibility, would violate the constitutional rights of the student affected; or, if he took</u>

the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student. The court did refer and hold to the doctrine of "qualified immunity" recently dictated in the case of Smith V. Losee, 485 F.2d, 384 (10th Cir. 1973). I might digress at this point, and say that the Smith case represented the foundation by which the United States District Court for the Northern District of Oklahoma granted a new trial in a case where initially, a jury had determined that seven school officials were, in fact, liable in a Section 1983 case, and held them so to an amount of $15,001.00 collectively,(Zacher V. ISD#40 (72-C-447, May 16, 1974)). This was the first and only case in the State of Oklahoma where board members and/or school officials have been held individually liable. Pursuant to their Motion for New Trial(which the Trial Court granted) the defendant board of education raised the "qualified privilege rule" and indicated that there was error in that the Trial Court failed to instruct the jury as to this principle. (This case was eventually settled). The so-called "qualified privilege rule" stands for a "form of immunity" from liability as to school officials, and actions taken by them in their official capacities, where such actions are taken in "good faith" and "without malice." The rule is based simply upon the broad duties and powers typically provided school boards as same are typically provided other legislative and quasi-judicial bodies. The philosophy behind such doctrine rests on the premise of preferring not to so severely restrict the activities and actions of public officials to the point where

total inaction would prevail.

Strickland has not told us anything different from what we already have known; that is, if at anytime one can establish so-called "bad faith" or "malicious intent," then obviously one substantiates a cause for a compensatory and perhaps punitive award. Further, if one can establish that an official took action when he knew of his own mind that such action would violate the constitutional rights of a person, then one has met the burden of proof so required.

The Supreme Court discussed the "objective" test versus a "subjective" test of good faith. The court said that "the official must himself, be acting sincerely, and with a belief that he is doing right; but an act violating a student's constitutional rights can be no more justified by ignorance, or disregard of settled indisputable law on the part of one entrusted with supervision of students' daily lives, than by the presence of actual malice." There is a natural common law assumption that public officials act in the best interests of their constituents and,further, act in accordance with the powers and duties conferred upon them by both statutory and constitutional law. Unlike the "maternity leave" cases, however, this assumption is not "irrebutable," as we have all obviously witnessed. The openness of government seemingly goes towards the principle of good faith. If at any time a school board meets in "secret session" and determines one's rights, without affording the opportunity for that person to respond or simply fails to provide common

"notice," then perhaps the "screw" turns at that point and we face possible establishment of bad faith. A suggestion has been made, in deference to Strickland, for school boards not to "overreact." Such is accurate as well as an additional suggestion, that being "haste makes waste." Too many school officials are "over-anxious" to determine a matter when oftentimes, just simply "sitting on" the controversy will assist resolution at a later time. An example of such premise would be one which involved an Oklahoma school district recently, the case involving that of an alleged homosexual who was a librarian in the school system. The facts were questionable as to the ability of the school administration to sustain termination of this particular certified employee. Certain officials, however, were anxious to pursue the matter, they being pressured from various sources, as is often the case. Legal counsel, along with investigators, had pursued the matter to the point of exhausting all efforts towards a resignation, but continuing to recommend that the teacher remain "suspended with pay." When administration officials recommended immediate termination of the teacher, the superintendent declined and preferred to keep the "status quo;" subsequently, the teacher resigned and the controversy terminated. Numerous instances could be listed when a similar situation has occurred and resolution of the matter effected, simply by being somewhat patient and refusing to overreact or to hastily act without a firm basis of supportive evidence.

Another case which a Federal Court just dismissed pursuant to a lengthy opinion, is noteworthy. The case involved the firing of a superintendent who himself was quite controversial and had, for a period of time, sustained his position by virtue of the fact that he enjoyed a minimal majority upon the school board, to-wit, a 3 to 2 vote. A candidate campaigned for election to defeat that third member and his sole campaign platform was termination of the superintendent. The board members, representing the minority, had made their positions obviously clear from time to time, by voting to terminate the superintendent. Subsequently the campaigner was elected, the board met and this time fired the superintendent, the minority suddenly becoming the majority. Pursuant to the laws of the State of Oklahoma, when one fires a teacher, as opposed to non-renewing a teacher, all that is required is the issuance of a notice of proposed dismissal stipulating causes and setting down a hearing at which time the actual and final decision is made. When such notice issues, typically, the board has its mind made up and a hearing conducted at a later time is nothing more than a facade. Such was an issue raised by the superintendent in court, pursuant to an alleged violation of his civil rights. The court held, however, that even though the board was perhaps prejudiced and biased, and clearly, had its mind made up prior to the hearing, they were best informed as to the superintendent's qualifications and by the very nature of his close working relationship with the board, they were the only

ones who could readily and competently testify as to his qualifications and act upon his employment contract.

The recent influx and impetus of the 11th Amendment doctrine as delineated in Edelman V. Jordan, 94 S.Ct. 1347(Ill, 1974), and the additional premise that Section 1983 does not apply to a schoolboard in that a schoolboard is not a "person" pursuant to the Civil Rights Act, leaves open, quite open in fact, the individual liability aspect of a public education lawsuit. The Strickland case and other related litigation should promote good business for the insurance companies who sell liability insurance, but it is hoped that any district heretofore preferring to exercise their discretion without benefit of competent legal counsel, would reverse itself, because Strickland has indicated that school officials are now burdened to know the "basic unquestioned constitutional rights of students and presumably of teachers." Thus, it may be assumed that a school official does in fact, risk a damage award if he does not bother to learn what constitutional rights a student or teacher is entitled to, if any at all. As the court indicated, there must be a degree of "immunity" allowed if the work of the schools is to go forward and however worded, the "immunity" must be such that public school officials understand that action taken in the good faith fulfillment of their responsibilities and within the bounds of reason under all the circumstances, will not be punished and that they need not exercise their discretion with undue timidity. In determining so-called

"clearly established constitutional rights," the basic principles of "notice" and "opportunity to respond" would suffice in the great majority of cases. The court well-indicated this principle when it said "school board members, among other duties, must judge whether there have been violations of school regulations and if so, the appropriate sanctions for the violations." The word "judge" is noteworthy as it indicates a fair determination based upon all the evidence competent, material and relevant and a determination then made and appropriate punishment, if applicable, sanctioned. School officials should remember the doctrine of Epperson v. Arkansas, 393 U.S. 97, 104 (1968), more recently emphasized in Goss V. Lopez, 95 S.Ct. 729 (Ohio, 1975), that "Section 1983 does not extend the right to relitigate in Federal Court, evidentiary questions arising in school disciplinary proceedings or the proper construction of school regulations." A system of public education which has evolved in this nation, relies necessarily upon the discretion and judgment of school administrators and school board members. Clearly, Section 1983 was not intended to be a vehicle for Federal Court correction of errors in the exercise of that discretion, which do not rise to the level of violations of specific constitutional guarantees.

Strickland, perhaps, provides the appropriate vehicle to bypass a jurisdictional motion to dismiss...beyond that, the burden of proof is a difficult and challenging one for the plaintiff. After all, as we have been told initially by Tinker(Tinker v. Des Moines Independent Community School District 393 U.S. 503, 89 S.Ct. 733(1969)) and now

by Strickland, "Public school students do have substantive and procedural rights while at school."

The premise of Strickland relates to the multiple aspects of any school system which is supported by public funds. Today's school system represents a complex and massive task as to the administration and operation of same. We continue to emphasize "local control" and in doing so, the public school system must be prepared and have done its "homework." The initial step in such "homework process" to assure that the individual school administrator and/or board member does not subject himself to a damage lawsuit pursuant to the burdens noted in Strickland, is that of the preparation of a sound, updated policy manual. All rules and regulations which are promulgated and intended to be implemented must be contained therein. Further, as highlighted within the Strickland epistle, board meetings themselves must be open, and in that regard, well publicized.

School District policies are intended to highlight certain problem areas that could well result in a lawsuit, as well as damages being awarded against an individual administrator and/or school board member. Any policy manual may extend to five or six volumes, because the State legislature, Federal government and/or the courts are edicting new requirements daily. The same is applicable to the respective boards of education in that, each time they meet, at least one or two policy matters will be discussed and/or recodified; typically, however, the administration fails in transferring these

policy matters to the official manual to assure that proper notification is provided to those parties concerned and having a need to know. Accordingly, it is vital that each set of minutes be carefully reviewed for these particular items, as well as proper forms and documentation, as board minutes are matters of public record and should be kept accessible within the central office for all to see upon reasonable request.

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Chapter 4

STUDENT PUBLICATIONS: JACOBS

The leading case in the area of "student publications" has been Eisner v. Stamford, 440 P.2d 803 (1971), although the Tinker case formed the premise when the U. S. Supreme Court held as follows:

> "Where there is no finding and no showing that the exercise of a forbidden right of expression of opinion would materially and substantially interfere with the requirements of appropriate discipline in the operation of a school, the prohibition cannot be sustained."

(Tinker v. Des Moines I.C.S.D., 89 S. Ct. 733 (1969)). In Eisner, the Second Circuit Court of Appeals held that the policy, which prohibited distribution of material which, by its content, "will interfere with the proper and orderly operation and discipline of the school, will cause violence or disorder or will constitute an invasion of the rights of others," but which did not prescribe punishment and which applied only to students on school grounds, was not unconstitutionally overbroad or vague insofar as it prescribed criteria by which school officials might prevent distribution, but that the policy, requiring prior approval of distribution, was constitutionally deficient insofar as it did not prescribed definite brief period within which review of submitted material might be submitted for clearance.

In deciding cases involving student publications, most courts apply the standard set forth in Tinker. Student expression, it was held, may be prohibited consistent with the First Amendment only

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when school authorities can reasonably "forecast" that substantial disruption, material interference with school activities, or intrusion into the school affairs of the lives of others will result.

The "forecast" test enunciated in Tinker inevitably leads to the question whether it is proper for school officials to require students to submit publications for prior approval as a means of allowing school officials to decide whether the publication would result in substantial disruption or material interference with school activities. More simply, the question becomes whether Tinker sanctions prior restraints, or censorship, when in society in general such restraints are impermissible as violative of the First Amendment right of free speech.

The Seventh Circuit Court of Appeals, in Fujishima v. Board of Education, 460 F.2d 1355 (1972), has seemingly adopted the rule that prior restraints are wholly inappropriate in high schools. Fujishima involved a class action suit brought by Chicago high school students which challenged the constitutionality of a school rule which stated:

> "No person shall be permitted...to distribute on the school premises any books, tracts, or other publications, ...unless the same shall have been approved by the General Superintendent of Schools."

The plaintiffs were suspended for the distribution on school premises of materials not previously authorized by the General Superintendent. The materials distributed were underground

newspapers, an unsigned petition and leaflets about the Viet Nam War.

In determining that the rule was unconstitutional on the ground that it required prior approval of publications and was thus a prior restraint in violation of the First Amendment, the court stated that such a finding was compelled by combining the holding of Tinker with an earlier Supreme Court decision which established freedom to publish and distribute a publication without prior approval as a First Amendment right, Near v. Minnesota ex rel. Olsen, 283 U. S. 697, 51 S. Ct. 625, 75 L.Ed. 1357 (1931). The court specifically rejected an interpretation of Tinker which allowed prior restraint of publications in high schools as a tool of school officials in "forecasting" substantial disruption of school activities even if accompanied by elaborate procedural safeguards.

In discussing the Tinker "forecast" test, the Fujishima court stated:

> "In proper context,...use of the word "forecast" in Tinker means a prediction by school officials that existing conduct .. - if allowed to continue - will probably interfere with school discipline...Tinker in no way suggests that students may be required to announce their intentions of engaging in certain conduct beforehand so school authorities may decide whether to prohibit the conduct..
>
> "The Tinker forecast rule is...not a basis for establishing a system of censorship and licensing designed to prevent the exercise of First Amendment rights."

This analysis makes it clear that the Seventh Circuit Court of Appeals interprets Tinker to hold that the "forecast" test may be

applied only to the existing conduct of students.

School officials may also promulgate reasonable, specific regulations setting forth the time, place, and manner in which distribution of written materials may occur. The Fujishima court points out, however, that school officials have the burden of telling students in general when, how and where they may distribute materials and may not require students to obtain administrative approval of the time, place, and manner of each particular distribution proposed.

Two 1973 cases have now been rendered, essentially upholding the Eisner doctrine. In Baughman v. Freinmuth, 478 F.2d 1345 (C.A. 4th, 1973), a prior submission rule of the school board relating to student publications, was held unconstitutional for the reasons that (1) the rule does not prescribe a time limit within which the principal must act, (2) does not prescribe a method of review of the principal's decision, and (3) does not contain a precise definition of "distribution," i.e., which refers to whether or not the "distribution" is substantial enough to cause a disruption of school operations.

The third requirement is somewhat confusing. Baughman does explain, however, that if the material in question constitutes general communicative material, then the "distribution" must be substantial, or in other words, a massive type of distribution. Conversely, if the document constitutes pornography, then the issuance of only one copy would be enough to cause disruption.

Such represents the type of definition the Court is referring to.

The Seventh Circuit Court of Appeals specifically discussed this right of school officials to set reasonable regulations regarding the time, place, and manner of distribution of written materials in Jacobs v. Board of School Commissioners, 490 F.2d 605 (1973). School administrators in the Indianapolis school system had enacted the following rule:

> "No student shall distribute in any school any literature that is...either by its content or manner of distribution itself, productive of or likely to produce a significant disruption of the normal educational processes or functions or purposes in any...schools or injury to others."

The court found this rule was unconstitutionally vague because it did not give adequate warning to students of the conduct prohibited, it was susceptible of arbitrary enforcement by teachers and administrators, and therefore inhibited the exercise of students' First Amendment rights. The court specifically rejected the school board's assertion that the rule was valid because of the similarity of its language to the test enunciated in Tinker, stating that the constitutional standard was not sufficiently specific to convey notice to students of what is prohibited.

In addition, the Seventh Circuit Court of Appeals, in Both Fujishima and Jacobs, discussed the issue of alleged obscenity of student publications, stating that any regulation prohibiting

obscene literature must contain the specific definition of sexual conduct of which the description is prohibited. Although the court in Jacobs recognized the difference in maturity and sophistication between high school students and university students, it concluded that profanity and occasional earthy words relating to bodily functions and sexual intercourse probably cannot be found to be likely to cause substantial disruption in the school and thus may not be prohibited.

Jacobs was appealed to the U. S. Supreme Court (42 L. W. 2336, 1975) and unfortunately, because of a technical problem dealing with proper identification of the "class", the high court vacated the Seventh Circuit's decision and ordered the initial complaint dismissed.

The ramifications of the Fujishima and Jacobs decisions are many and complex, but one underlying theme is clear - the Seventh Circuit Court of Appeals is extremely protective of the First Amendment rights of students in the instances of publications and any administrative attempt at the deprivation of such rights will be thoroughly scrutinized.

Both the Fujishima and Jacobs cases dealt with student publication which were not school sponsored. Not answered by these cases is the question whether prior administrative approval of school sponsored publications may be required. While a general reading of Fujishima appears to mandate that there may be no screening by

school officials of articles or materials written for and distributed by students, it is a well-established principle that prior restraints are not necessarily unconstitutional under all circumstances. It is possible that the courts may sustain an argument that school officials should have regulatory control over the school sponsored newspaper, based on the educational and institutional needs of public schools and the fact that the paper is funded by tax dollars. Schools which publish a newspaper in conjunction with a journalism or English class or as an express part of the curriculum are probably in a better legal position to enact rules regarding the content of their publication than those schools in which the newspaper is an extracurricular activity under the control of students.

In conclusion, the Fujishima case holds that, at least as to non-school sponsored publication, prior restraints on student expression violate the First Amendment. Jacobs established that school rules regulating content and manner of distribution of student publications must be precisely drawn, subject to the effect of the Supreme Court's refusal to consider the merits of Jacobs.

ED120948

Chapter 5

TEMPORARY DISABILITIES & TITLE VII

Jo Carol LaFleur,* Susan Cohen* and Carolyn Aiello* were responsible for significant United States Supreme Court decisions regarding the constitutionality of "forced maternity leave policies" and the question of the applicability of "sick leave" being payable for pregnancy.

*Cleveland Board of Education v. LaFleur, 94 S.Ct. 791, 1974.

*Cohen v. Chesterfield County School Board, 94 S.Ct. 791, 1974.

*Geduldig v. Aiello, 94 S.Ct. 2485, 1974.

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On January 21, 1974, the United States Supreme Court handed down their decision in LaFleur and Cohen and specifically held that the mandatory termination provisions of the maternity leave policies at issue violated the due process clause of the Fourteenth Amendment. Such constituted the infamous "forced maternity leave policy" cases.

On June 17, 1974, the United States Supreme Court handed down their decision in Aiello, wherein the Court held that the State may exclude pregnancies from benefits payable for other disabilities. Such constitutes the question of whether or not sick leave is payable for pregnancy and the court said no.

Litigation continues, however, as school districts have been beseiged by teacher organizations attempting to develop their own interpretations of LaFleur and Aiello. Additionally, there remains the question of Title VII applicability in regard to the "sick leave" issue.

For example, a teacher was successful in an Oregon suit(Hutchison V. Lake Oswego School District #7, U.S.D.C., Oregon, #73-339, April 25, 1974), regarding use of accumulated sick leave to bear a child. Policies and procedure of the school district which allowed sick leave only for illness or injury, and under which the school district refused to permit the teacher to apply her accumulated sick leave to childbirth was held to violate the equal protection clause of the Fourteenth Amendment and further held that such discrimination constituted an "unfair labor practice" under Title VII of the Civil Rights Act of 1964.

Hutchison, however, was decided approximately a month and a half prior to Aiello, although as indicated, Aiello did not consider Title VII in its determination, preferring to rely solely on the force and effect of the equal protection clause of the Fourteenth Amendment.

Subsequent to Aiello, a Federal Court decision in California (Delaurier V. San Diego Unified School District, U.S.D.C., 7th District Calif., #74-176-E, Dec. 6, 1974), held that a school board policy which denied sick leave benefits during maternity leaves violated the sex discrimination provisions of Title VII. The Court obviously relied heavily upon the EEOC regulations. Obviously, then, we have a severe conflict in decisions.

Aiello was followed in Minnesota recently, (Seaman V. Springlake Independent School District #16, U.S.D.C., 4th Dist. Minn. #4-73, CIV. 23, July 29, 1974) where a Federal District Court, citing Aiello, denied the teacher's claim for sick leave payments during maternity disability explaining that such additional payment would "drain money, (from the district's budget) that the school board and apparently the teachers themselves, would rather have available for salaries and other purposes."

Geduldig V. Aiello clearly provides relief to many school districts where budgets are minimal. The "cost" factor was clearly an element strongly considered by the high court as was the discretionary aspect of permitting a state to determine its own disability insurance programs. Title VII and the EEOC regulations clearly do not consider these points of determination and although litigation will no doubt continue in an effort to destroy the premise of Aiello, it would appear

that the constitutional aspect of the issue should and will continue. "The Equal Protection Clause does not require that a state must choose between attacking every aspect of a problem or not attacking the problem at all."

However, in the first appellate decision on the question, the U.S. Court of Appeals for the Third Circuit has ruled in Wetzel V. Liberty Mutual Insurance Co., (508 F2d 239, C.A. Pa., 1975) that the exclusion of pregnancy disabilities from an employer's income protection plan discriminates against women in violation of Title VII of the 1964 Civil Rights Act. The court also found that the employer's maternity leave policy, which requires pregnant employees to return to work within three months of childbirth, is unlawful.

In Aiello, the Supreme Court upheld the constitutionality of a state disability insurance program that excluded disabilities relating to normal pregnancies from coverage. The Third Circuit, however, found that this decision is not dispositive of the question presented to it. "Aiello," the appeals court noted, "concerned sex discrimination in violation of Title VII."

To justify excluding pregnancy from the plan, the employer argued that pregnancy is voluntary, that pregnancy is not a sickness, and that the exclusion was required in order to maintain the financial integrity of the plan. The court was not persuaded. Even if pregnancy can be considered voluntary, the plan does not exclude disabilities resulting from risky activities undertaken voluntarily. The court also points out that a woman disabled by pregnancy suffers from the same loss of

income and incurs the same medical expenses as someone disabled by sickness. Finally, the court found that under Title VII cost is no defense to this type of discrimination.

Under the employer's leave policy, a pregnant employee had to return to work within six months from the time the maternity leave commenced or within three months from the date of childbirth, whichever came first. This time limitation applied only to maternity leave and not to any other leave of absence for temporary disability. Thus, a person who suffered a temporary disability other than pregnancy, could return to work after recovery, while a woman with a pregnancy-related disability must return to work within the specified time limit or be fired.

The Court indicated that under EEOC guidelines, such maternity leave policy violated Title VII saying that pregnancy must be treated no differently than any other temporary disability for leave purposes.

The employer maintained that since most women recovered within six weeks and since most women do not return to work after childbirth, the company is justified in maintaining the present maternity leave policy. The court disagreed, saying this attitude is precisely what Congress intended to eliminate. Discrimination based on stereotypes or overly categorized distinctions between men and women are forbidden under Title VII.

Concerning the mandatory leave policies at issue in LaFleur and Cohen, the Supreme Court said that an arbitrary cut-off date prior to childbirth has no valid relationship to the state's interest in pre-

serving the continuity of instruction so long as the teacher is required to give substantial advance notice as to her pregnancy state. The court talked of an "irrebutable presumption," such being long disfavored under the due process clauses of the Fifth and Fourteenth Amendments. Accordingly, the court felt that such mandatory leave provisions could not pass muster because they employed this "irrebutable presumption" which unduly penalized a female teacher for deciding to bear a child. Further, the court indicated that the ability of any particular pregnant woman to continue at work past any fixed time in her pregnancy, is very much an individual matter and neither the necessity for continuity of instruction or the state interest in keeping physically unfit teachers out of the classroom can justify a so-called "arbitrary" cut-off date.

The court did reserve the possibility of some minimal leave time as to the teacher commencing her leave period prior to childbirth. Further, the court indicated that a school board could require the pregnant teacher to submit to medical examination by a school board physician or simply require the pregnant teacher to submit to medical examination by a school board physician or simply require each teacher to submit a current certification from her obstetrician as to her ability to continue work. Such would also apply to the physical ability of a teacher to return to work.

In regard to the "return" rule, one should recall that two different rules were before the Court.

Both the "Cleveland" and "Chesterfield County" return rules contained limitations upon a teacher's eligibility to return to work after childbirth. Under the "Cleveland" rule, the teacher was not eligible to return to work until the commencement of the next regular school semester following the time when her child attained the age of 3 months.

The "Cleveland rule," however, emphasized that the child must reach the age of 3 months before the return rule began to operate. The Court indicated that the three month provision has nothing to do with continuity of instruction. Therefore, the "Cleveland" return rule was found to be arbitrary and irrational and violative of the due process clause. The "Chesterfield County" rule, however, under which the teacher became eligible for re-employment upon submission of a medical certificate from her physician and return to work was guaranteed no later than the commencement of the next school semester following childbirth, was found to be sound.

Accordingly, we can conclude the following:

1. A School district may require of the employee immediate notification of her state of pregnancy and, as well, an additional statement as to when she would desire commencing leave;

2. A school district may require the employee to furnish a doctor's statement as to her physical well-being and ability to continue work;

3. A school district may require the employee to commence her leave with sufficient lead time in order to contract with a substitute. In regard to the lead time, on the 6th day of December, 1974, the United States District Court for the Southern District of California decided the

case of Delaurier V. San Diego Unified School District. The San Diego commencement of leave rule required that the teacher commence leave at the end of her eighth month of pregnancy or, in other words, 30 days prior to childbirth. The court held that the 4 week maternity leave policy was reasonable under the due process and equal protection clause when measured agains a 3 prong test - the interest of the teacher, the interest of the people, the interest in maintaining an orderly system in which to educate all children in the community. This, case of course, is subject to appeal, but it does lend some guidelines to the so-called "lead time" rule.

4. The school district may require the employee to not return to work until the commencement of the term immediately following delivery;

5. The school district may require that the teacher provide a doctor's statement of physcial well being prior to her return;

6. A school district may require an "intent" statement on the part of the pregnant employee as whether or not she will, in fact, return following delivery.

Many districts have questioned whether or not a maternity leave policy is even necessary. The law will not permit one to do indirectly what it cannot do directly. Therefore, if a district does not have a maternity leave policy and an employee requests that she be placed on leave, the district has created a situation of either forcing a resignation or working until delivery. Although there has been no decision specifically on this point, it would appear that a maternity leave policy must be offered as a typical "leave of absence without pay."

The decisions of the United States Supreme Court in LaFleur, Cohen and Aiello indicate that a constant line of communication must be established as between the school administration, the pregnant

employee and her physician. Obviously, because of the unique status of the academic school year, employees will become pregnant at so-called inopportune times and such will create difficulty in interpreting any maternity policy that may be applicable. For example, an employee indicates to the school administration that the delivery date will be the first of August and school commences the 20th of August. She indicates she will be on the job the 20th. As it turns out, she is unable to appear for work on the 20th of August. Can a school district then require her to continue the leave period until the commencement of the spring semester? Obviously, this matter would have to be determined in close consultation with the employee and physician as to when exactly the employee could return. It would be unreasonable to require the employee to remain out of work for the full term if she could commence work again within one or two weeks of the commencement of school. However, the school district could ill afford to provide a substitute or replacement teacher for a period exceeding 30 days into the school year. Consider the teacher whose delivery date would be the first of June with school ending May 20th. Could the district require her to leave 15 days prior to the end of school? Such obviously would not be reasonable assuming the teacher was physically able to complete the school year. Accordingly, any maternity leave policy must be flexible enough to handle these unusual cases, and yet, be firm enough to assure that the employee has adequate and sufficient notice as to what her particular leave situation will encompass.

There continue to questions concerning maternity leave and applicability of sick leave from school districts across the State of Oklahoma. In "The Powers and Duties of an Oklahoma School District" (OU Law Ctr. 1974) Chapter 4, page 68, I attempted to answer questions regarding these two issues. Further clarification, however, seems to be in order, in that school districts have been beseiged by teacher organizations attempting to construe both LaFleur and Aiello differently.

In the State of Oklahoma, all payments for leaves must be authorized by statute. For example, sick leave is authorized by Title 70, Section 6-104 of the Oklahoma Statutes; Personal business leave is authorized by Section 6-105, emergency leave is authorized by Section 6-104, and professional leave is authorized by Section 1-109. These four types of leaves are the only leaves authorized by law in Oklahoma to be "paid" leaves. All other leaves would be classified under the authority of Title 70, Section 5-117, whereby the powers and duties section provides that a school district shall have power to provide for employees leaves of absence "without pay." Accordingly, maternity leave, much the same as a sabbatical leave, is not authorized to be "paid" leave. The Aiello decision supports this premise, in holding that even though a normal pregnancy does constitute a so-called "disability", the decision of a state or political sub-division not to provide benefits pursuant to the risk of pregnancy does not constitute invidious discrimination violative of the equal protection clause. What this means is, that once a school employee assumes the status of

maternity leave, then that leave period, however long it may be, is not one for which the employee may be paid pursuant to the statutes of the State of Oklahoma and the Constitution of the United States. Further, it is noteworthy that "maternity leave," only applies until the time of childbirth. The time subsequent to childbirth is classified as "child care" leave, which is not payable under the statutes of the State of Oklahoma.

Assuming that the employee is continuing to work while pregnant and complications arise causing the employee to be absent from her work. So long as the employee has not commenced actual maternity leave, then sick leave would be payable for those days absent because of complications arising from her pregnancy. A miscarriage, for example, could be included relative to a complication. This type of information, however, needs to be supported by board regulation to ensure that all employees are aware of what type of conditions would be subject to the payment of sick leave.

The LaFleur and Cohen opinions are not quite so simple to understand. Various interpretations have been offered with respect to exactly what the Court did hold. The Court essentially held that it is unconstitutional to presume that every teacher who is four to six months pregnant is physically incapable of continuing her duties and at the same time, it is an erroneous presumption to assume that the employee is not able to resume work until such time as the child has reached a particular age. What the Court is saying, is that each particular employee's case must be considered as an individual matter

as between the school administration, the employee and her physician. Administrative needs, however, are to be considered in a limited sense regarding when leave is to commence. The Court suggested that a 30 day period prior to delivery might be appropriate and in this vein, the United States District Court for the Southern District of California on December 5, 1974, held that the 30 day provision is a valid one and not unconstitutional. Therefore, it may be said that an employee, assuming she is physically capable of performing her normal duties, may continue such duties until 30 days prior to the projected delivery date.

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Chapter 6

SCHOOL BOARD MEETING MANAGEMENT

The importance of official school board minutes cannot be overemphasized in these times involving numerous litigable issues and controversies. The sole evidence as to what exactly occurred during a school board meeting is found in such minutes. Accordingly, it is appropriate to provide assistance to the school superintendent or designated administrative official, who is responsible for organizing and conducting regular and/or special school board meetings during the course of the fiscal year.

Most school laws provide that school boards will meet at least once a month at a regularly appointed date, time and place. Today, many school districts tend to meet more often as the extent of business is more than can be adequately determined at one meeting per month. Accordingly, the regular meetings of the board of education should be promulgated and notice provided prior to the commencement of the fiscal year. Any changes thereafter must be appropriately publicized to assure that all school district patrons are notified. A more critical problem lies in the area of special meetings. Unfortunately, there is very little statutory and/or regulatory dictate as to what type of notice is to be provided. Certainly, all board members and appropriate staff personnel must be notified and necessary steps taken to assure each person is properly notified. Publication of such special meetings should be attempted, although in many small school districts, a daily

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edition of a local newspaper is not provided. In these instances, bulletins should be posted at appropriate points within the community so that the patrons may inform themselves of any such special meetings.

In the absence of specific statutory language to the contrary, the governing board of a school district is responsible for making meeting cancellation decisions pursuant to its own policies, if it has any, or to act otherwise pursuant to sound discretion.

The governing board shall "fix the time and place" for the meeting; hence, by the language alone, we could assume they could cancel a meeting if they so desired.

In order for the resolutions of a school board to be binding, they must have arisen from a formal board meeting. However, the decision to cancel a meeting would presumably not have to withstand the same legal scrutiny accorded a district's decision to enter a "binding" agreement (i.e., contract for a teacher, etc.). Therefore, an informal meeting of the board members with a majority ratifying the cancellation of the meeting should suffice.

The assumption could be made that if a presiding officer or majority of the board can call for a special meeting, they also could ask for a cancellation of a regular meeting, on the rationale that the decision to cancel a regular meeting is inferior to the decision to call a special meeting.

If we assume the governing board can cancel a meeting, any rescheduled meeting must meet the posting requirements above, whether it is deemed a regular or special meeting.

With respect to the posting of the cancellation itself, absent controlling statutory language, one may assume that, time permitting, the notice of cancellation should be posted in accord with regular or special meeting requirements discussed above. If time does not permit posting of such notice, then it is reasonable to assume that cancellation may still be called with such notice as time permits.

Black's Law Dictionary defines adjournment as "to put off; defer; to postpone action of a convened court or body until another time specified." There are no annotated cases defining adjournment; but if the word is strictly construed to mean "postpone," or "defer," rather than postponement of an "on-going meeting," the language then may answer the question about who can cancel a meeting. However, if we assume the correct interpretation is the latter, then there is no posting requirement since the adjournment relates to postponement of an "on-going meeting." If one assumes the former, and construes adjournment to mean the same as cancellation, then a subsequent notice may have to be posted to meet the requirements. Thus, it would be important to determine the purpose of the meeting cancellation or adjournment.

The agenda represents the "game plan" for the board meeting. As such, the agenda, once prepared, should be distributed to all board members, appropriate staff personnel, parties who have requested an appearance before the board and others who have a "need to know." This may well include the local newspaper and other community public officials. Moreover, the school board attorney should be provided an

agenda, particularly where the attorney does not attend each and every board meeting. Such will provide him the opportunity to review the agenda and earmark those items, if any, that may prove to cause difficulty or require particular legal interpretation. In addition, any special reports and/or voluminous preparations should be distributed to the board members prior to the meeting in order to assure their familiarity with said documents prior to board action. The agenda need not follow any particular format, although it is highly recommended that those items requiring presentations of specific personnel occur initially so that they may then be excused. Also recommended is that "executive sessions" be scheduled last on the agenda.

The promulgation of board minutes which will follow later, should essentially follow in form the agenda outline. Obviously, an agenda may vary during the course of the board meeting, depending upon the facts and circumstances involved. An effort should be made, however, to follow the agenda closely so as to assure an effective and efficient meeting.

Prepared agendas, which have been reviewed by the Superintendent's office, are mailed to the board members at least three days in advance of the meeting, to permit thorough study. Agendas are also sent to the schools, employees' organizations, and the press. Of course, agendas are also made available to the public before and during the board meetings.

Those matters that are considered to be non-controversial and

require only routine action by the board are labeled "consent" items. Use the same agenda format but simply place "Consent" in the margin opposite the agenda topic. The Superintendent's recommendation on the action to be taken is indicated in a concise summary on the printed agenda.

All of the items for consent action are listed by number at the beginning of the agenda, and this is called the "Consent Calendar." Adoption of the Consent Calendar by the board may be made by one motion only; provided, however, that the chairman of the board first advises the audience that the Consent Calendar matters will be adopted in total by one action of the board, unless any board member or individual organization interested in one or more consent matters has any question or wishes to make a statement. In that event, the chairman of the board simply withdraws that item from the Consent Calendar and it is discussed in the same order that it appears on the agenda format. The adoption of the Consent Calendar is by roll call vote of all the board members. The advantages of utilizing a consent agenda are:

1. The meeting time has been cut approximately one-fourth.
2. Board members will study the prepared back-up material in more depth.
3. The board minutes can be prepared more easily.
4. There is more advance interest in the board meetings by the employees' organizations, the student representatives, and the public.

In Oklahoma, the law provides that a board must meet in regular session once per month. This may well be typical of most states, but consider that a regular session means "uniformity in scheduling", in

that the community at large can depend upon the board meeting upon a regular day and at a regular time at least once per month. Depending upon the size of the school district, it may be necessary to hold more than one regular session per month, although some statutes, Oklahoma's being one, prohibit more than one regular session per month. An alternative would be "adjourned" meetings, but all other meetings held would be classified as "special" meetings. During the course of "special" meetings, business conducted is limited to that for which the meeting was called (in some jurisdictions the law permits the conduction of "minor" business in addition to that for which the meeting was called). Problems concerning "notice" to board members must also be considered relative to the calling of special meetings. Notice should be provided in a most efficient and appropriate manner to all concerned and "proof" of notice must be recorded in the minutes.

Each board meeting should commence at a reguar designated time and should conclude at a reasonable time. In recent years, it has been the tendency, as school district business increases, to conduct lengthy board meetings. People tend to become tired and efficiency suffers during such sessions. Accordingly, boards should consider alternatives with respect to meeting times and the meeting frequency depending upon the quantity of business on the agenda. For example, one Board of Education now meets on a regular basis each Monday of each week, beginning at 7:00 P.M. and usually terminating no later than midnight. Occasionally

a board will adjourn Monday evening and resume business in a breakfast session the following morning. Consideration might also be given to a 4:00 P.M. commencement time. Regardless, the scheduling of board meetings should be closely and adequately surveyed by each school district.

As to a meeting place, many school district facilities leave much to be desired. A typical meeting place is the Superintendent's office; but such does not permit room for the public to observe the proceedings. A board should be concerned in always providing ample space for visitors. It is a necessity, however, to meet within the public school locality, in that the records of a school district must be kept in a central location within the school and those records obviously need to be accessible to the board of education and staff members during the course of any board meeting.

Physical arrangements are often overlooked, particularly in small school districts. It has been observed that large school districts take sufficient steps to assure the physical aspect of the board meeting is appropriate. Oftentimes, however, small school districts will only have in attendance the board members and the executive officer. This fact, however, does not mean that physical arrangements should be forgotten. One should assure comfortable seating for all parties who may attend. Many boards meet in the superintendent's office, which normally is not large enough to conduct a school board meeting. One possibility would be to set up the meeting in the regular conference room and/or superintendent's office; then if a crowd gathers, the meeting

can be moved to the auditorium or cafeteria area. Pencils and writing material should be provided each board member as well as each staff member. Items such as a public address system, ash trays, dictation equipment, podiums, writing surfaces for staff personnel and the press should be noted and action taken accordingly.

Board meetings today have become longer in duration and accordingly, extremely tiresome and burdensome. If a lengthy meeting is anticipated, the district might consider either commencing the meeting at an earlier time or setting up an "adjourned meeting" at a later date in order to complete the business before the board. Board meetings that extend until two, three or four o'clock in the morning will generally fail in their efforts to act upon board business efficienty and effectively. The Superintendent should be cognizant of time limitations as to presentations, reports and make an effort to circumvent extraneous discussions.

One secret, leading to the efficiency and effectiveness of a school board meeting, is to assure that the board chairman is familiar with Roberts Rules of Order and general Board Meeting Procedures. The business at hand will be conducted in an appropriate manner, if this is the case. Items such as motions, debates, discussions, tabling, adjournments, are all critical and how to get "in and out" of particular situations is important and must be approached in a firm, but courteous manner by the board chairman, with the competent assistance of the Superintendent.

The chairman's performance alone, will normally make the difference between a well organized and conducted meeting and one which is not. During "reorganization" each year, the executive officer should assume the chair until such time as a new chairman is elected. Such makes for excellent procedure and transition.

The board president or chairman requires special communication with the superintendent because he is responsible for the operation of the board meeting, the only place that official decisions can be made concerning the affairs of the district.

The board president must understand:

1. The problems that are to be handled on the forthcoming agenda.
2. The reasons for items on the agenda.
3. The reasons for the sequence of events on the agenda.
4. Approximately how much time each item will take.
5. What action is necessary by the board for each item on the agenda.
6. At what point the superintendent will be recognized.
7. What kinds of reports the superintendent will be giving to the board.
8. How the superintendent intends to use his staff members or outside consultants during the meeting.
9. How to handle emergency situations that might arise.
10. How to deal with pressure groups.

These items and many more require special communication with the superintendent. It must be understood by all the other board members that this communication between the superintendent and the board president is going to occur.

Various procedures may be utilized to take a good set of school board minutes. Generally, only action items and reports need be recorded. Any shift or change in procedure should be noted by its time and what is occurring. For example, the time the board went into executive session and the time the board came out of executive session should be noted. Concerning action items, often the Superintendent and/or other administrative personnel may have recommendations as to action items on the agenda. These recommendations should be in writing and should be distributed to the board members prior to the meeting. Generally, any information that the board members should be made aware of and/or that they shall consider during the course of the meeting should be provided prior to the board meeting.

As to the taking of minutes, this should not be performed by any board member nor administrative staff member. Although the board clerk is normally responsible for the documentation of board minutes, oftentimes you will find that a board member also is clerk of the board and he cannot be concerned with the minutes during the course of a board meeting. Therefore, a secretary should be recruited to take board minutes and then transcribe said minutes, attaching a certification of transcription thereto. One should also provide the board minutes to the school board attorney for review prior to approval. The school board attorney can note policy items, amendments, etc. and bring these to the attention of the appropriate officials and further, can assure that the format of board minutes is proper as to all action items, etc.

Finally, when officially approved, board minutes should be signed by all board members, the executive officer and/or Superintendent and the board clerk. This is good practice and good policy. An approval form might also be utilized for the school board attorney.

The school board attorney can be invaluable to the Superintendent in assisting him in the preparation and final draft of the board minutes. This document, as indicated earlier, constitutes the sole evidence of what happened that particular evening. Many school districts today, tape their meetings with the assistance of a transcription secretary. It is sometimes difficult for a secretary to determine what and what not to include within board minutes. A "certification of transcription" should always be attached to each set of board minutes to provide evidence of who exactly transcribed the information and to indicate accuracy. The school board attorney can also assist the superintendent in preparing resolutions and policy matters passed upon and can earmark those items which should be "extracted" from the minutes and "inserted" within the appropriate policy manual, faculty handbook, etc. Further, these particular items must be promulgated and notice provided as to those patrons, personnel, students, etc. who may be subject to such action passage. An approval form for the board attorney to sign exhibits effectuality. When the final draft of the board minutes is prepared it should be distributed to each board member prior to the next meeting so they will have the opportunity to review, and approval of those minutes at the next board meeting will asume a minimum of time. As an added note, it is good practice to automatically

provide a copy of the approved board minutes to the local newspaper to assure openness and cooperativeness. Board minutes are public records and should be filed and retained appropriately.

School board meetings can be conducted in a more efficient and effective manner if planning sessions are utilized by the superintendent and his staff personnel. As in any other important event, planning is necessary and critical to a meeting of public officials who have been duly elected and/or appointed to conduct the business of a governmental entity, to-wit, the school district. Special meetings, such as those called to consider bid proposals, hearings relating to school district personnel and/or students, should be dealt with specially and formulated in accordance with law, the advice of the school board attorney and the convenience of those parties whom the meeting concerns.

Section 3 of Article 2 of the Oklahoma Constitution provides as follows:

> "The people have the right peaceably to assemble for their own good, and to apply to those invested with the powers of government for redress of grievances by petition, address, or remonstrance."

Any educational institution in the State of Oklahoma financed by public funds constitutes "those invested with the powers of government." From time to time the state legislature conducts public hearings concerning critical legislative issues. School trustees are no exception to this. More and more boards of education are being required to conduct public hearings in which school patrons have the opportunity to present their ideas to their elected officials. Further, more form-

alized hearings are required pursuant to specific statutory edicts, i.e., local board hearings as to the termination of certified employees.

Oftentimes, controversies arise within the school community which the elected trustees are called upon to determine within their discretionary authority as provided for by law. A distinction is to be made between the typical public "forum: and the "individual hearing" that may be accorded certified personnel and/or students pursuant to an alleged cause for termination and/or alleged violation of school policy. Board trustees must be aware of restrictions placed upon them pursuant to the open meeting law (Title 25, O.S., Section 201) in the conduction of such hearings and further, should be overly concerned with such basic procedural due process provisions of notice and the opportunity to appear and respond.

A review of Oklahoma's Administrative Procedures Act, Title 75, Oklahoma Statutes, Section 301, should be "required reading" for all elected board mambers. Oklahoma school districts are exempt from this act, but institutions of higher education are not so exempted, except with respect to expelling students for disciplinary reasons. This act requires that before any rule is adopted by any particular State agency, notice of same must be provided as to the intended action and then a public hearing set before final determination is rendered. The act further provides for petitioning, court action and sets out in detail rules and procedure relative to so-called "individual proceedings."

The principle of "exhaustion of administrative remedies" has always constituted an important and viable premise. This edict simply means

that before an aggrieved party may proceed to a court of law for redress and relief, that party must pursue any and all available administrative channels. This premise is obviously applicable to every governing board in that its intent is to permit the local board to determine the matter within its own administrative channels prior to the filing of a lawsuit. Typically, many lawsuits occur simply because of a lack of communication between the grievant and the governing board. Setting up procedures to assure that these grievances are communicated to the governing board is an important and critical step towards preventing court litigation. Accordingly, your attention is directed to the procedures relative to public hearings of which are designed to emphasize the doctrine of "exhaustion of administrative remedies."

Good management is a criteria which exists as all-important today with particular regard to school district business. Public officials are closely scrutinized as to their actions, performance, responsibilities and duties. Each board meeting provides the opportunity for the public to observe their duly elected public officials in action and specifically enables them to observe the expenditure of their public moneys and the administering of their public properties. When dealing with the public and their particular "assets," public officials must accord responsible and efficient action. The managerial ability of those persons responsible for the conduct of a school board meeting must be competent.

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Chapter 7

NEGOTIATIONS: 1975

To date, limited litigation has surfaced relative to the Oklahoma Professional Negotiations Act, Title 70, Oklahoma Statutes, Sections 509.1 et seq., although there has been some interpretation applied by the State Attorney General.

The PN Act can be broken down into several categories in an effort to provide procedural steps of organization. The Act has been criticized as permitting too wide a play of imagination as to the proper statutory directive relative to the negotiation process itself. This may be true, but one might consider that some states, i.e., Illinois, perform collective bargaining procedures absent any statutory authority. We can however, anticipate further amendments to Oklahoma's PN Act based upon experience collected from those Oklahoma school districts involved in the process.

Initially, the board of education has nothing to do with instigating negotiations within the school district. The Attorney General has made this perfectly clear in two recent opinions. As a matter of law then, the initial surge by the Professional Educators within the school district who desire to negotiate, subsequent proceedings relative to the collection of authorization cards and any election pertaining to the designation of specific representatives to represent said organization, is all performed in a unitary manner and totally isolated from any board of education participation.

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The intitial point at which the board of education enters into the process is when the particular professional organization requests "recognition". At such time, the first critical problem is that of "verification", and although one court case relates to the question of how verification is actuated, that case has not been finally determined, and the PN Act itself does not assist either party relative to this inquiry. As a practical matter, only at such time as the authorization card count is close would the problem of verification be one of significance.

Assuming verification is had and a proper majority exists, the next step is the promulgation and completion of a "procedural agreement". Typically the professional organization and the board of education will prepare their own procedural agreement and then confer as to a compromise at which time both organizations are required to approve such document. At this point in time and heretofore, both organizations would have solicited appropriate negotiation consultant services.

A question typically raised is whether or not the process involved preceding the ratification of a procedural agreement and actual commencement of the bargaining "table talk", is a part of the actual negotiations process. Many districts have been involved in controversy relative to the setting up of procedures for the actual negotiations process and, accordingly, have experienced "impasse" relative to negotiating the procedural agreement. Such obviously refers to the question of what procedure is to be implemented when

an impasse is declared prior to the approval of the procedural agreement, or controversy subsequent immediately thereto, but prior to the parties actually sitting down at the bargaining table. Before any procedural agreement is approved and ratified, the procedure dictated in Section 509.7, i.e., fact finding, would be followed. Subsequent to a procedural agreement being approved, however, the procedure set down in the procedural agreement would take precedent, excepting controversy relative to the procedural agreement.

The next step is that relating to the bargaining table process itself. Time tables are usually applicable here and typically, articles of negotiation, (speaking towards the scope of negotiation) are presented by the professional organization to the board of education representatives. The board of education representatives then respond and may well forward to the professional organization certain articles of negotiation reflecting the school district's point of view.

Procedurally speaking, each article is to be noted, and an impasse should not be declared until all articles which are negotiable and agreed to, have been so declared; then, impasse procedures will be applicable to those, disagreeable articles. Actually, referring to the scope of negotiations, the board of education has the final word.

Once negotiations have ceased, the "negotiations agreement" must be drafted and approved by both parties. Once approved, it exists as the "contract" until the following fiscal year at which time the

total process is again pursued. Negotiations should be a year-to-year process, although procedural guidelines may be extended beyond one year with the option of amendment.

Parties appear to be more accustomed to the process and more workable situations seem to be prominent throughout those school districts which are involved in the process. Further, boards of education, now recognizing the fact that negotiation is a "fact of law," are commencing to do their homework relative to the actual implementation of the process and appear to be more readily competent to deal with the professional organizations than heretofore.

The Oklahoma Professional Negotiations Act (Title 70, § 509.1 et seq.) is totally devoid as to a procedure for verification of authorization cards. A District Court decision held that a board of education could not become involved in the process as utilized by the teachers organization in soliciting authorization cards. Further, the Court seemed to say that as to verification itself, the utilization of a "neutral third party" would be appropriate and permissable, to assure non-divulgence of those professional educators who voted in favor of the professional negotiations process.

An additional question arises, regarding certain professional educators being intimidated, harrassed and/or threatened with respect to the signing of said cards. An additional problem would also be the validation of the signature itself to assure no forgery is present.

One procedure which has been suggested which seems to be reasonable, is that an outside audit firm or some approved neutral third party validate each signature card by sending out a confirmation letter to each professional educator requesting each to validate their particular desire and return such verification to the audit firm. This procedure would assure secrecy and non-divulgence of the particular professional educator involved and would also assure the board of education that proper validation and verification of the cards had occurred. Because of the fact that, under current law, a board of education cannot become involved in the selection process itself, nor can it intervene in any form or manner with the organization's so-called "election," such verification process would assure the board that proper procedures have been utilized and that the authorization cards represent the true and correct desire of that particular professional educator.

In opinion #73-260, the Attorney General held that the same majority of professional educators is necessary to elect the individual bargaining representatives of the professional organization as is necessary to designate such organization as their representative, such majority being a majority of the professional educators of the school district. It is assumed that the A.G. is not talking of numbers, but rather, a "simple" majority of all professional educators which as indicated, is the requirement as to initial recognition. The A.G. goes on to say that in the absence of a

statutory provision to the contrary, this election of the individual bargaining representatives of the professional organization would be reasonable notice of the election itself, and of the candidates to be voted on, giving sufficient time to enable the professional educators of the school district to cast their ballots. In other words, this opinion totally excludes the respective Board of Education from participation in the election of bargaining representative for the professional organization.

In opinion #74-265, the A.G. held that where a professional organization is designated pursuant to Section 509.2, during a particular school year, by a majority of professional educators of a school district for negotiations with the board, such designation continues and does not automatically terminate after such school year. This means that once the professional organization has been recognized by the appropriate majority, that professional organization would continue to serve in its representative capacity until such time as some affirmative action terminates its recognition. Accordingly, it is critical to include within each procedural agreement a provision relative to the term of recognition and/or a provision that upon proper petition and/or reasonable doubt by the Board of Education, a resubmission of authorizations cards is required. An additional possibility would be simply limiting the term of the recognition factor from year to year or providing for "re-newal" procedures.

In further consideration of the re-evaluation of the so-called "majority support" in favor of the negotiations process, Section

509.2 of Title 70 indicates that the local board of education shall recognize a professional organization that secures authorizations signed by a majority of the professional educators designating said organization as their representative for negotiations. The word "authorization" has been construed as meaning "written evidence showing member of bargaining class as authorizing a certain group to be bargaining agent." Further, "only one professional organization may represent the professional educators." The question then, is what should occur and upon what basis should it occur that a so-called recount or resubmission of authorization cards would be appropriate to determine whether the bargaining agent continues to represent a majority of the teachers.

The Professional Negotiations Act is essentially silent to this question. Many district have incorporated a provision in their Procedural Agreements indicated that any time that a board of education is in "reasonable doubt" that the "majority" continues to exist, or pursuant to a petition signed and presented by at least twenty per cent of the professional educators, the board may call for resubmission of cards. Certainly, those professional employees who do not agree with the current representative would have the right to petition the board of education to redetermine the matter. Further, the board of education, pursuant to its rights and responsibilities as the governing body of the school district, would certainly have the right to request a resubmission and recount pursuant to "reasonable doubt," which would indicate

that there is a serious question as to whether a majority continues to exist.

Accordingly, it would be wise on the part of all negotiating parties to provide for some provision, either by resolution and/or petition whereby the matter could be redetermined.

As was explictly held by the Attorney General only one professional organization may represent professional educators pursuant to and authorized by Title 70, Oklahoma Statutes, Section 509.2. This means that although there may well be a separate classification of professional employees within the school district, once an organization has been designated pursuant to the authorization card method, then only that organization would be involved in the negotations process with the Board of Education. This has caused a particular problem as to the administrator principal, depending upon the size of school district. The principal is obviously a part of the so-called "management team" and normally would be involved as part of that team during the negotiations process.

Principals obviously have certain goals and objectives as to their particular status within the system and desire to communicate these objectives and goals to higher management, to wit, the superintendent and central office staff as well as the Board of Education. Officially, this is not possible in the State of Oklahoma. Accordingly principals must be dealt with by alternative methods. At all times, however, principals should be considered

as part of the management team and it is with a great deal of interest that the following special article be reproduced to provide ideas towards this particular endeavor.

In a time when a good deal of effort is being directed toward the development of managment teams, administrative teams, leadership teams and an extensive variety of other schemes to develop a cohesive management function with respect to the operation of schools, the impact of collective bargaining is having a serious negative effect on achieving such worthwhile goals.

In many cases principals have lost varying degrees of management authority, while at the same experiencing less economic improvement as a result of elimination of the traditional "ratio" between teacher and administrative salary schedules.

In addition, principals have found themselves on the receiving end of information relative to the negotiated agreement after the agreement was ratified by the employee organization and board of education, rather than being kept abreast of developments and problems during the process. In short, it would appear that boards of education, superintendents and many other upper level executives have tended to view the principal as a kind of intermediary in staff relations as opposed to occupying a position of "first line" manager.

In a 1971 publication of NASSP entitled "Management Crisis: A Solution" it is stated that:

> "Principals and supervisors may well have to negotiate system-wide agreements with their boards of education, covering such items as salaries, leaves, fringe benefits, vacancies, promotions and transfers, legal protection and grievance procedures; while on the other hand establishing concurrently an internal and informal structure to assume participation in decision making in the school."

In contracts to what might be considered the national posture of NASSP the US Supreme Court in NLRB vs. Bell Aerospace, (416 U.S. 267, 94 S. Ct. 1757, 40 L.Ed. 134, 1974), ruled that all classifications of managerial employees or supervisors, regardless of how low they are in the hierarchy, cannot organize collectively. In dicta the court said,

> Supervisors are management people. They have distinguished themselves in their work. They have demonstrated their ability to take action. No one forced them to become supervisors. They abandoned the "collective security" of the rank and file voluntarily, because they believed the opportunities thus opened to them to be more valuable to them than such "security". It seems wrong, and it is wrong, to subject people of this kind, who have demonstrated their initiative, their ambition and their ability to get ahead, to the leveling processes of seniority, uniformity and standarization that the Supreme Court recognizes as being fundamental principles of unionism.

While the US Supreme Court is taking a rather hard posture with respect to establishment of collective bargaining units for management and the NASSP is alleging the necessity to form such units in the public sector, the American Federation of Labor is actively organizing administrative units all across the country. Progress in this effort has been slow but steady. In addition, in one of the most objectionable examples of collective bargaining legislation yet introduced at the Federal level - HR 8677 - coverage

for purposes of organizing units includes all "first level supervisors."

In response to this national activity, the Ohio Association of Secondary School Principals and the Ohio Association of Elementary Principals have formed a subsidiary organization known as the Ohio Council of Administrative Personnel Associations -- in the collective bargaining sense, an association of units. It is estimated that Ohio currently has slightly over sixty such units in operation.

The principal is and must be the front-line proponent of management's point of view. Great responsibility for the proper administration of the agreement and grievance procedure as well as the traditional functions of the position make "mid-management" a far more complex process today than at any other time in history.

Title 70, Oklahoma Statutes, Section 509.5 provides as follows:

> "All employees of a school district other than those employees who are professional educators shall likewise be eligible to designate an organization composed exclusively of such employees to represent them in negotiating and concluding an agreement with such school district on the terms and conditions of their employment. Such non-professional educator employees shall have the same rights and duties with respect to such matters as those conferred upon professional educators and professional organizations by this act. Any representatives for said organization shall be employed by the school district within the district, and no other person shall be authorized to represent said organization."

With the recent advent of school district support personnel organizing for purposes of negotiations, it is critical now that boards of education and their representatives study, with

all deliberate speed, the various problems involved in negotiating with non-certified personnel.

Personnel concerned with include, amonst others, secretaries, bus drivers, custodians and cafeteria workers. Such represents a unique situation, in that, although these personnel are as a group, non-certified, as opposed to those certified personnel who are commonly teachers within a school system, these support-type people, by virtue of their specific positions within the school system have special problems and circumstances relative to their work requirements. For example, a secretary's work requirement differs significantly from that of a bus driver. Obviously, secretaries may feel that they lack a community of interest with bus drivers and vise-versa. Cafeteria workers on the other hand, may feel that they should not be in the same negotiating unit with custodians and so on. But, pursuant to the organizational aspect of the Oklahoma Education Association, officially organizing support personnel as an associate department of the OEA, school boards are now forced to recognize all non-certified or support personnel as that group covered by Section 509.9 of the Professional Negotiations Act. An additional note might be that although the statute refers to support personnel as "non-professional" it has been advisable not to apply this term to the non-teaching employees. This term suggests invidious comparisons which may be resented by the non-teaching employees. Non-teaching employees prefer to consider themselves professionals, whether or not they are

certified. In fact, administrative officials should avoid anything that smacks of second class citizenship in negotiating with non-teaching employees. Remember that teachers are not the only group of employees who can shut down a school system as some districts unfortunately have learned the hard way.

Assuming only one contract will eventually be negotiated with support personnel, administrations will be faced with the difficulty of treating non-teachers less generously than teachers. For example, it would be difficult to allow teachers more leave time than is allowed other kinds of employees. Such a difference would be embarrassing to support, either at the bargaining table or in the form of public opinion. Hence, in negotiating with teachers, the administration must consider the implications of a concession for other employees.

It is further desireable to have the same person responsible for negotiations with all groups. This may not be feasible where the line administrator for non-teaching personnel is a different person from the line administrator responsible for teaching personnel. All non-teaching employees may be administered through the office of the business manager, for example, whereas the Assistant Superintendent for personnel may be responsible for teachers. However, even if each negotiating team has a different chief negotiator, which more than likely will be true as between teachers and non-teachers, there should be common representation of all management negotiation teams. At the minimum, there must

be good communication between management personnel responsible for negotiating with both groups; otherwise, items negotiated in one contract may create unanticipated difficulties in another.

In the long run, administrators will find negotiating with non-teachers to be very similar to teacher negotiations. As we have already found in Oklahoma, there has been established a tense rivalry between organizing associations. Regardless, the best policy is to be as well prepared for negotiations with non-teaching or support employees as you hopefully are today for certified personnel.

Title 70, Oklahoma Statutes, Section 509.6 of the Oklahoma Professional Negotiations Act sets out the following:

> "The board of education and the representatives of the organization must negotiate in good faith on items effecting the performance of professional services."

This is the only reference in the Professional Negotiations Act to "the scope of negotiations." Recently, the Kansas Supreme Court decided what is negotiable, the court saying that "terms and conditions of professional service" means more than wages and hours being negotiable, but is something less than district educational policies. Generally, the scope of negotiations will tend to work itself out as the process proceeds at the bargaining table. Never should a board of education attempt to bind itself to certain items of negotiations within the procedural agreement. Essentially the board will always have the final word as to what

is not negotiable. Typically, the teachers organization will want to negotiate everything, including educational policy matters. Obviously, this should not be the case and the only items which should be negotiated are once again those affecting the performance of professional services, i.e., terms and conditions of employment.

Working conditions are generally conceded as being negotiable, but the problem then arises as to what are "working conditions." The term is somewhat nebulous when discussed with teachers and other staff members. Does it include salaries, directly or indirectly? Suppose that teachers negotiating for salaries ignore the ratio concept by which principal salaries are tied in to the maximum of the teacher's salary. If the teachers object to the ratio schedule and the teacher maximum higher is than the principal's minimum, would this issue be negotiable as a condition of work? Job descriptions and definitions would assist in attempting to define what exactly are "working conditions" and how they are applicable under certain circumstances. Generally, it is preferred to refer to the phrase "terms of employment" linking directly to the contractual arrangement between the employee and the employer, i.e., what items pertain to the employment contract. Moreover, all items that would normally and reasonably pertain to such contract would be items of negotiation. When referring to rules and regulations, perhaps a rule of "professional growth" would be applicable as a negotiated item, not so much

as to whether the teacher or the employee wants to dictate what that rule will be, but whether or not the rule would be applicable to the teacher pursuant to the terms of employment. Fringe benefit items are also obviously negotiable in most cases, again pertaining to the terms of employment.

Conclusively then, the scope of negotiations is somewhat of an "experience" process pertaining to when the association and the board have become involved in the process and dealing with certain items that are of importance to both the association and the board. While the board is responsible for policy input, policy matters should be directed from employee committees, but not from the bargaining table.

Speaking of "good faith", recently, in a State Supreme Court decision out of Washington (Spokane Education Association v. Barnes, et al., 517 P.2d 1362 (1974), the court stated as follows:

> "Full effect can be given to the statute which gives the certificated employees organization the right to negotiation with the school board respecting certain subjects, only when both parties act in good faith, make timely notification to the other of their intentions, and maintain an awareness of limitations imposed upon school boards by both time and statutes."

The tendency of teacher organizations has been to allege non-compliance with the "good faith" rule whenever disagreement occurs within the negotiations process. "Good faith" is defined by statute in Oklahoma. Title 25, Oklahoma Statutes, Section 9 states as follows:

> "Good faith consist in an honest intention to abstain from taking any unconscious advantage of another, even through the forms or technicalities of law, together with an absence of all information or belief of facts which would render the transaction unconscientious."

The premise of "good faith" which was initially construed in Sapulpa Petroleum Company v. McRay, 136 Okl. 269, 277 Pac. 589 (1929) where the court said that good faith is the opposite of fraud and its non-existence must be established by proof. This would seem to say that bad faith cannot be assumed, nor presumed, and any allegation of same must be established by competent evidence, to wit, proof, before a court of competent jurisdiction. The process of negotiations consists of agreements and disagreements, but the fact of disagreement does not constitute any manner of fraud, nor does it mean that the particular party so disagreeing is in bad faith. Further, when one construes the provision of Section 509.6, it indicates that all parties must negotiate in good faith on items affecting the performance of professional services, which goes towards the "scope of negotiations" rather than the procedures utilized during the course of said negotiations process. The premise of "honesty" might well be considered in that as quoted by a negotiations expert, "boards have become a bit cynical when teacher demands are couched in benefits for the children." It would be advisable for all parties to consider the foregoing prior to accusing the other of "bad faith".

Title 70, Oklahoma Statutes, Section 509.7 provides in part

as follows:

> "A procedure for resolving impasses will be developed by the Board of Education and the representatives of the Professional or non-professional organization; if agreement cannot be reached, the items causing the impasse shall be referred to a three member committee. (emphasis added)

This particular section is labeled "Fact Finding Committee". Many procedures have been utilized by various states in resolving impasses, to-wit, fact finding, voluntary arbitration, binding arbitration and mediation. Many procedural agreements reviewed indicate that certain options are included as to the procedures to be utilized in resolving an impasse. It appears, however, that fact finding is the sole and only procedure authorized pursuant to Oklahoma's Professional Negotiations Act. The provision indicates that a "procedure for resolving impasses will be developed" and goes on to say "if agreement cannot be reached." The term "agreement" obviously refers to an item which has caused the impasse; therefore, the statute goes on to tell us that such items "shall be referred to a three member committee, to-wit, a fact finding committee." Accordingly, mediation and/or arbitration does not appear to be authorized by law in Oklahoma.

The development of a fact finding committee is not necessarily an easy task. Normally, the most common procedure for selection of the third party, who in accordance with the law, shall serve as chairman of the committee, is agreement by the members appointed by each adversary. If the two cannot agree,

the statute is silent as to resolution of the issue. Some states provide for appointment by the District Court of the American Arbitration Association. Obviously, the third position is a critical one in that likely,the advocate chosen by each party will be persuasive toward that particular party's position, and the third party will constitute the deciding vote. It appears then, that the statute limits selection as between the two appointed members. Accordingly, here follow some guidelines as to that particular selection:

1. Never select a party who is a resident and/or member of the community where the negotiation is occurring;

2. Do not choose any one associated with any teacher organization and/or board/administrator organization;

3. Do not choose any political official;

4. Attempt to choose someone from an occupational area totally separate from that of the public school system. A professional arbitrator might be a possibility but as such, these are normally looked upon with great dismay amongst states involved in professional negotiations.

Obviously, the field is somewhat limited, but consider such professions as clergymen, attorneys and doctors. Professional educators at the higher educational level might be a possibility, but remember that they may well be involved in negotiations on their particular campus and as such, would be persuaded by their status, either as teacher and/or administrator.

Certainly all participants on the fact finding committee should be reimbursed their expenses and paid per diem, and all costs

be equally borne between the two parties. The committee's job is an extensive one and much time and detailed work will be involved prior to the issuance of their recommendations.

Recently, it was contended that Section 509.7 of Title 70, did not specifically provide for any method to resolve an impasse other than the process of "fact-finding." A Tulsa County District Court ruled that the Section does provide for "some" alternative method of impasse resolution and if the procedural agreement provides for such an alternative, then that alternative must be met by both parties.

This brings us to the question as to what exactly is the process of "mediation". Mediation should not be confused with other types of third party interventions such as "fact-finding" or "arbitration." The function of the mediator is to help the parties reach their <u>own</u> agreement. It is not his job to make an agreement for them. The theory of mediation is that an experienced, impartial outsider, who brings a fresh clinical prospective to the dispute, can be an effective catalyst in moving the parties toward agreement by, among other things, helping them to surmount problems of communication, to overcome hostility and suspicion and to evaluate proposals and positions realistically.

The Oklahoma Professional Negotiations Act does not provide a procedure for selection of a mediator. Selection is a difficult task, since both parties must agree upon one person, as opposed to fact-finding where both parties select one person and those

two persons select a third. Realizing this problem, the Tulsa District Court took it upon itself to appoint a mediator, who was a well qualified party and totally separated from the school district in question. Both litigants were directed to submit the issues of impasse in writing to the mediator and then both chief negotiators would meet with the mediator in an attempt to resolve the issues. Essentially the mediator will propose a "compromise" of sorts, which can be accepted or rejected by either party. Something to consider then in procedural agreements, is a statement that inability to agree upon a mediator would cause that selection to be vested in the local District Court and upon selection, both parties agree to share mediation costs equally.

Mediation can be a workable solution to an impasse problem and there is a general consensus that its use should be encouraged. Take caution, however! Mediation can be quite time consuming and unless it can progress in a reasonable and efficient manner, then the parties might consider totally bypassing the process of mediation and going directly to "fact-finding."

Some recent cases have emphasized the so-called "managerial prerogative" doctrine relating to that which is not a negotiable item, but rather, comes within the prerogative of the school administration. (That which has a minimal effect only.) Normally these items will be minor in their very nature as is exemplified by one case out of New Jersey where the teachers were complaining of the requirement that they "sign in" each morning when reporting to work and "sign out" in the evening when departing. The controversy was further complicated by the issue of whether teacher was to

sign his "full name" or "initial" the sign-in roll. The court, in that particular case, said such was a matter of "managerial prerogative" and not one that was negotiable under the Collective Bargaining Act (This particular case is currently on appeal to the State Supreme Court of New Jersey).

Another New Jersey case related to the assignment of teachers to non-teaching duties. The court issued an order enjoining the teachers association from proceeding to arbitration on the matters of assignments of teachers in the performance of corridor, lavatory and outside duties and tutorial assignments. The Superior Court affirmed the lower court's decision on the grounds that no alteration in the terms and conditions of employment resulted from the assignments. Such would seem to be the test.

In a higher education case, the assignment of teachers and the number of classes was at issue and the New Jersey Commissioner of Education held that these type of responsibilities may not be delegated, nor may they be bargained away. In the absence of a showing of arbitrariness, capriciousness or unreasonableness in making of such assignments, the actions of a board will not be disturbed.

Such forms the premise of the so-called "managerial prerogative" doctrine. This doctrine obviously is essential to the smooth and efficient operation of a school district, but should not be abused. When a board refuses to negotiate a certain item, or

subsequently refuses to arbitrate a particular item pursuant to any grievance procedure, etc., the doctrine of "managerial prerogative" should be raised as an affirmative defense on the part of the board of education. Facts leading to a finding of non-arbitrariness, non-capriciousness and/or non-unreasonableness should be cumulated to support such doctrine and it appears that the courts are receptive to such a defense and are prone to uphold them.

Matters of an educational nature, rather than those concerning the terms and conditions of employment, are within the discretion of the board of education and the "management prerogative" doctrine appears to support such premise.

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Chapter 8 - "THE ACCESS TO STUDENT RECORDS ACT" (The Buckley Amendment - H.R. 69)

Although much has been written and many discussions have ensued regarding the Ruckley Amendment, there are really no experts on the matter. Perhaps that is just as well, since the value of an expert may also be questionable. At least--one farmer in Oklahoma had reason to question the value of an expert. Neither the farmer, nor his wife had finished high school, so when their son finished, it was somewhat of a first for the family. When he announced that he wanted to go to college, the father swallowed his disappointment at not having him join him on the farm and both parents decided to let him go on to college. They were very proud of him and certainly this must be in his best interest. After four years of scratching a living from the soil to provide for his college education, he announced that he wanted to go to graduate school. Upon further questioning, it appeared that he had majored in Math in college and now wanted a Master's degree. Once again the father had to postpone the time for the son to join him on the farm. Two years later, home on Christmas vacation, the son informed the parents that he was going to stay for the Ph.D. degree he explained would make him an "expert".

Several years later, when he had finally finished all of his education, the parents decided to give a party so all their friends could toast the "expert". The father, anxious for the son to make

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a good impression on the country folks, prodded him to say something to the people. The son asked what he should say and the father reminded him of the time Mrs. Jone's niece came for a visit and spoke French for the folks. The son complained that he had been a Math major and that you didn't speak math. He explained that he had taken such classes as Trigonometry, Algebra, Linear Equations, Calculus, etc. Whereupon the father replied "That's it son, speak a little algebra for them. Just say anything,just a few words."

Realizing that he would have to placate his father in some way, the son turned turned to the guests and said,"πr^2."

The father fell back into his seat and dropped his head into his hands, and said, "Oh my God. Eight years he has been in school. I spent $16,000 turning him into a math expert and the idiot doesn't know that pie are round!"

Well for what it's worth, I am going to speak a little Buckley to you.

The appropriate name for the Buckley Amendment is the Family Educational Rights and Privacy Act. It is also known as H.R. 69. Throughout our discussion the term "Buckley Amendment" and "Family Privacy Act" will be used interchangeably.

The Buckley Amendment which originally made headlines in November of 1974 was itself amended in January, 1975, after all of the educational forces in the country put their ideas together and protested some of the provisions of the original Amendment. The Buckley Amendment has had a very serious and profound effect upon the keeping of records in both the public school system and the higher education system.

The Amendment is an attempt to cure inequities in or abuses by the public school system and the universities in the keeping of records and the dissemination of information about the student, both of which practices might be potentially harmful to the student in later years. Particularly, they might affect his career choices or ability to achieve at a future time by documenting past difficulties.

Now, we are told that the Buckley Amendment will correct the unfortunate practices. Let us look at what the Buckley Amendment actually does. In essence, there are two major provisions in the Amendment. The first is that it permits access to records maintained by educational institutions and agencies by providing that the institution must provide the parents of the student access to all official records directly relating to the students. Further, the institutions must provide the parents of the students, and in some cases--the students themselves, an opportunity for a hearing to challenge the records, if the

charge is made that the records are inaccurate, misleading, or otherwise inappropriate.

The second major concern of the Amendment places certain restrictions on the release or dissemination of personally identifiable information contained in the student's educational record. The primary restriction is that the consent of the student or the parent must be obtained before the institution may release the information to most third parties. We use the word "most" because the Amendment contains an exception which allows institutions to release information, without the consent of the student or parents, under certain conditions which we will shortly cover.

Thus, the Buckley Amendment is a broad law which says, in essence, that the student and/or his parents must be able to see information kept on the student and further, they must be given an opportunity to challenge this information. There are, however, certain key words that we must be aware of in order to fully understand the Buckley Amendment. The first is "educational record." Under the Amendment, what is an "educational record"? One very important reason for defining this term is that the complaining student or parent seeking access to the record will more than likely contend that everything in your possession is an educational record. On the other hand, not very many years ago, when you felt certain the records were not accessible, you may also have claimed that they were educational records. Today, with access given to educational records, our claim

will most likely be to say they are not educational records and thus are exempt from coverage under the Buckley Amendment.

An "educational record" is that record which is kept by the institution as an official record of the student's attendance or performance while he is a student at the institution. Now, by using the word "official," we introduce another dimension to the definition. We tend to think of "official" records as being those records which will be utilized by the institution in its relationships with the student or in its relationships with other entities on behalf of the student. Therefore, those records kept in administrative offices, which may be referred to from time to time, and which may be added to or documented for the purpose of keeping a complete record of the student are considered educational records.

There are records which are kept by schools which are exempt from the bill. One such type of record, and this is a very important one, is the record which is established where there is the concept of privilege between the parties. Primarily, this information is in the hands of physicians, psychiatrists, or psychologists. It will also include the attorney's work product if you have an attorney. The information in the files of these persons which has been gathered as a result of a confidential and privileged relationship between the parties has always been inaccessible under the law and the redraft of the Buckley Amendment

recognizes these privileged relationships. This is information which must be protected from disclosure because it was revealed under a unique set of circumstances in which the professional recognizes an obligation or duty to the person to hold the information confidential and to utilize the information only for the purpose of rendering professional services to that person.

Information that is kept by law enforcement officials is exempt from the Buckley Amendment, provided that information is not readily accessible to others. Now this is very similar to what we see in the concept of "privilege". The information which is in the hands of psychiatrists, physicians, lawyers, is protected from disclosure because of the unique relationship between the professional and the person. The average employee, including a person who is an official of the educational institution, does not have ready access to information in the hands of the physician or the psychiatrist. That information is privileged and is a personal matter between the physician and the patient.

It is important to note the categories of records kept by an institution which are exempt from coverage under the Amendment because the records which are exempt must be kept separate from those records which are accessible. Generally, educational records are available to persons other than the records custodian. In your immediate case, the records are available to the Principal and other members of the administrative staff. They are also accessible to teachers, counselors. Thus, if records of a "privileged" nature, such as those of the psychiatrist or the physician were kept along with the general educational records, the information within these files would also be available to the persons mentioned above.

Although the exemption granted "law enforcement" units are not categorized as "privileged", they are intended for use only within the law enforcement setting. To release the information prior to adjudication of charges or to satisfactory completion of an investigation might, in addition to interfering with the rights of the parties involved, prejudice the law enforcement efforts. Thus, these records must be kept separate from other educational records and must not be made available to persons other than law enforcement personnel of the same jurisdiction. Additionally, the school system must be careful to insure that law enforcement personnel do not have open access to other educational records. The total thrust of this exclusion

is that law enforcement units and other educational units maintain separate files which relate only to the function which they are authorized to perform.

There are two other categories of records which are not accessible to the student and parents under the Family Privacy Act. These are the employment records of non-student personnel and the personal records of supervisory and administrative personnel. Employment records, generally, are exempt from coverage as they relate to the business functions of the institution and not to the educational function. Again, though, one must be careful not to integrate these records with the educational records of the institution.

The last type of record which may be kept by an institution, but is not subject to inspection as an "educational record", is the record which is kept by supervisory, administrative, or educational personnel when the record is in the sole possession of the maker and is not accessible or revealed to any other person except a substitute. Many questions have been raised concerning this type of record. Does it apply to the personal notes of a teacher expressing his opinion of the abilities or inabilities of students? What about notes on behavior kept in the roll book?

The answer at this time appears to be that any notes, even personal, that are kept with records or files required to be kept by the school are educational records and are

accessible under the Family Privacy Act. Thus, if additional comments are made in the roll book and the roll books are kept by the institution in the future, then those notes become educational records and are accessible. The key phrase is "are not accessible or revealed to any person except a substitute." Thus, if the records are comingled with those of the institution, they would become educational records and would be accessible under the Act. Similarly, the notes of the professor maintained and utilized only by that person do not become educational records and will not be accessible.

Not only does the Act delineate those records which are not to be considered "educational records" for the purpose of gaining access to them, but it also allows certain information within the records of the institution to be withheld from inspection. Under the Act, students are not given the right of access to the financial records of the parents. Neither student nor parent is permitted to inspect or review the following information:

1. Confidential letters and statements placed in the files prior to January 1, 1975 (providing such letters or statements are not used by the institution for any purposes other than those purposes for which they were sought).
2. Information contained in confidential recommendations or statements for which the student has waived his right to access to the same.

The Act allows a student to execute a waiver relinquishing his right of access to confidential statements relating to (1) admission to an educational agency or institution, (2) application for employment, and (3) the receipt of an honor or honorary recognition. Please note that although the student waives the right of access to the information, the student must, upon request, be supplied with the names of all persons making confidential statements and the statements must be utilized only for the purpose for which they were originally intended. Most important--the institution may not require the execution of waivers as a condition for admission, receipt of financial aid, or receipt of any other services or benefits from the institution.

The provisions relating to confidential letters and statements were not in the first draft of the Act and were placed in the amended version as a result of the numerous comments and complaints received by the Department of Health, Education, and Welfare and the Congress.

In attempting to implement the Family Privacy Act, it will be necessary to keep in mind the Act's definition of "student". A "student" is, for most purposes, any person who is currently in attendance at or has formerly been in attendance at an educational institution. The Act's definition includes "any person with respect to whom an educational agency or institution maintains educational records or personally identifiable information but does not

include a person who has not been in attendance at such agency or institution." Since employee records are exempt from the Act, we might assume that this vague definition was designed as a "catch-all".

Of extreme importance to the institution are the provisions of the Act which permit release of information without the student's consent. There are nine instances in which an institution may release information about the student without the student's consent. Additionally, institutions may release "directory information". Directory information includes, but is not necessarily limited to:

(1) the student's name
(2) address and telephone number
(3) date and place of birth
(4) major field of study
(5) participation in officially recognized activities and sports (includes listing of weight and height of members of athletic teams)
(6) dates of attendance at the institution
(7) degrees and awards received
(8) most recent previous educational institution attended

This general provision permitting release of directory information allows institutions to publish directories, yearbooks, graduation rosters and other materials which are routinely printed by institutions. However, the institution must give public notice of the categories of information

it has designated as public directory information and must allow a reasonable period of time for the student or parent to inform the institution that the information designated should not be released without prior consent.

This poses quite a problem for those institutions handling large numbers of students and particularly those institutions using computers to provide the designated information. Obviously, at some point, the law and common sense must share the same berth. One recommended way of dealing with the burden placed on the institution by allowing exceptions is to choose public ways of disseminating information about the Family Privacy Act and its provisions.

The institution is under an obligation to notify students and/or parents of their rights under the Act anyway. This may be accomplished by publishing a summary of the regulations in the local newspapers, the campus or school paper, and by distributing leaflet in registration packets or at the time of registration. Additionally, the information should be printed in the student handbook if you have one. The regulations do not require that you, in fact, reach each and every student or parent, but rather that you make a good faith effort and calculated attempt to reach each student and/or parent. The method of dissemination should be designed to insure that the information is readily available to all students or parents.

The initial communications with students or parents

should also be used to designate the directory-type information and inform them of their right to withhold the same. For administrative convenience, it would be possible to inform students that the information will not selectively be withheld. Since there is no requirement that directory information be published, you might wish to delete the student's information entirely from the publication rather than institute a complex system permitting selective deletion. Generally, most directories are set up to permit deletion of address and phone number with little difficulty.

Information, other than directory information, which may be released without the student's prior consent, includes:

(A) Information released to other school officials, or teachers, within the same institution, provided these persons have been determined by the institution to have a legitimate educational interest in the information.

Now, we are talking of developing a policy within the institution governing internal release of information. Many institutions utilize an "as needed" system, rather than delineating the categories of persons who may have access to the record. Usually, the records custodian will make the decision on whether an institutional official's request to see a record should be granted. Of course, there are always certain categories of officials who will always have access to the records. They might include, but not limited to: counselors, academic administrative officers, the Principal and his assistants, and teachers who currently have the students enrolled in their classes. Others may utilize the records on a "need" basis. The problem is not as acute in secondary education as it is in higher education, which often employs many part-time teaching assistants or associates. These persons are frequently enrolled in courses themselves and though charged with teaching a particular course, do not have the unique responsibilities to the institution and the students that full-time teachers or employees have.

(B) Release of information to officials of other schools or systems in which the student seeks to enroll, providing that the student's parents be notified of the transfer of the record and given an opportunity for a hearing to challenge the content of the record.

It is generally feared that the student might interpret this action as providing an opportunity to challenge grades given as course evaluations. While access to the record would notify the student of the grade received, schools always provide other methods of notification. It is obvious from the legislative history that the drafters of the Act contemplated other means to contest the validity of the grade given. However, if no other provision is made for grade challenges, the student might indeed seek to utilize this as a means of redress.

The Act seeks to avoid an additional "paper flow" burden on the school by allowing the former school to freely transmit information to the new school. Most schools have chosen to ignore this provision and still require release of information by the student before transferring the record. Indeed, this was the common practice prior to the Family Privacy Act and most have considered it wise to continue to operate in this manner. However, the provision is important as it permits the release of records without the student's consent to schools to which the student has made application.

The opportunity for a hearing should be granted upon written request by the student or parent. It is suggested that the procedure chosen be a simple one with a minimum number of persons involved. The hearing officer should be someone with authority to direct a change in the record. If not, then the recommendation of the hearing board should be transmitted to someone with authority to direct a change in the record.

Should the decision be made that the educational record is inaccurate, misleading, or otherwise in violation of the student's rights, then the record must be corrected and inappropriate date must be removed.

You may have noticed that this provision of the Act entitles the parent to receive a copy of the record if desired. The Act does not preclude charging a nominal fee for copies of the record requested.

(C) Authorized representatives of the Comptroller General of the U.S., the Secretary, an administrative head of an educational agency, or State educational authorities in connection with the audit or evaluation of a program, or in connection with the enforcement of Federal legal requirements which relate to such programs.

Those representatives or officials receiving the information are required by the Act to protect the personal identification of students or parents with regard to their use of the data. Additionally, they are required to destroy personally identifiable information when the purpose for which it was acquired no longer exists.

(D) Educational records or information from the same may be released in connection with a student's application for, or receipt of, financial aid.

High schools and other institutions may supply information from the record when requested to do so in order to support or supplement the student's request for financial aid. Many of the agencies awarding scholarships or other forms of financial aid require continuous reports on the student's academic achievement and general standing with the University. Institutions of higher education may feel free to furnish these reports to the awarding agency or party.

(E) State and local officials or authorities to which information from institutional records is required to be reported or disclosed in accordance with State statutes which were in effect prior to the effective date of the Family Privacy Act (November 17, 1974).

There are very few state regulations which would seem to have this effect. The institution will already be apprised of any state government agencies they were required to report to prior to November of 1974 and under this provision, may continue to so report.

(F) Organizations conducting studies for educational agencies for or on behalf of educational agencies for the purpose of developing, validating, or administering student tests or programs may be furnished information from the educational records of the students.

The only restrictions on the release of this information are the requirements that the studies are not conducted in such a manner as will permit the personal identification of the students or their parents by persons who are not associated with the agency and that all personally identifiable information be destroyed upon completion of the project.

(G) Accrediting organizations may utilize information from the educational records in order to carry out their accrediting functions.

This provision acquires new dimensions when applied to the higher education sphere. Records may be released to professional organizations such as the American Bar Association and the American Medical Association under this provision as they may play an important role in the accreditation of professional schools such as a law school or medical school.

(H) Parents of a dependent student, as defined in Section 152 of the Internal Revenue Code may receive information contained within the educational record of their dependent child.

Under Section 152 of the Internal Revenue Code, a dependent must receive more than one-half of his/her support for the calendar year from the taxpayer claiming the dependent. In addition to members of the immediate family, such as children or stepchildren of the taxpayer or parents of the taxpayer, the taxpayer may have brothers and sisters, or sons-in-law and daughters-in-law as dependents. There are numerous classifications under which the dependent may come and several other regulations governing "dependent" status.

It would probably be appropriate for the institution to request a statement from the parent or guardian in which the taxpayer claims that the student is a dependent in accordance with the Internal Revenue Code. Such statements may already appear in the Financial Aids office. It is not necessary to have the parents come forth with the Internal Revenue Service returns to prove that they are the parents or guardians for the purposes of the Code. The signed statement to the effect that the students are "dependent" under the Internal Revenue Service Code should satisfy the burden of the institution to comply with the Family Privacy Act and should be sufficient to relieve the institution of liability.

The importance of having the parent manifest that the student is a dependent relates to a provision in the Family -

Privacy Act which states that "whenever a student has attained eighteen years of age, or is attending an institution of post-secondary education the permission or consent required of and the right accorded to the parents of the student shall thereafter only be required of and accorded to the student." This means that there is at least a presumption of "majority" rights when a student enters an institution of higher education. Thus, the parent's rights expire and in order to obtain access to educational records, the parent must maintain that the child is a "dependent" for income tax purposes.

My interpretation of the provision giving rights to students over the age of 18 or in attendance at institutions of higher education is that the use of the word "only" in the provision requires that you adopt a policy of non-access for parents of students who are adults. The provision relating to "dependent" students is an exception to the rule and only that and should not be relied on by institutions to justify open access of the record for parents.

(I) Records may be released, subject to regulations of the Secretary (HEW) in connection with an emergency, to appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons.

Although no such regulations have been issued by the Secretary of HEW, this provision generally allows for suspension of the rules in times of emergency or crisis where the health or safety of persons may depend on release of or access to the information.

This concludes the categories governing release of information to other persons without prior consent of the student or parents.

The release of any information, other than directory information, which does not come within the above exceptions, should be permitted only when:

(1) there is written consent from the student's parents (or the student if he is above 18 or in a higher eduation institution); (2) the information is furnished in order to comply with a court order, or pursuant to a lawfully issued subpoena. Even under these circumstances, you must notify the students and/or the parents before complying with the order. You may initially use a phone call for this notice, and immediately follow up with a written communication.

Please remember that although the Act continually uses the word "parent", the legal guardian of a student may have the same rights under the Act. Don't deny access to the record to the legal guardian of a child simply because he or she is not the natural parent of the student. The legal guardian is that person whom the court recognizes as being responsible for the child and includes not only natural parents and adoptive parents, but may also be the older brother or sister of the child, or an aunt or grandmother, just to mention a few examples.

Another term needing further clarification is the word "access". The right of access means the right to inspect and review the contents of the record. Further, there is a right to copies of the record at the expense of the parent or student. Thus, institutions should not be hesitant to charge for copies made of information in the record.

The right of access would also imply the right to request and receive explanations and interpretations about entries in the file.

The Family Privacy Act places several affirmative burdens on the school.

The first is tightening up the operations of the records section. Perhaps, you need to institute a policy of controlled access to the records. Under such a policy, the instructors would no longer come into the records area and simply pull whatever record they wanted. Instead, they would request the records custodian to pull the records and communicate the reason for needing to see the record. Counselors and others with a continuous need to know might still have open access to the record.

Another obligation of the institution, under the Act, is to maintain a record which will show the names of all individuals other than officials or authorized employees within the school itself who have requested access to the students' records. This record, in the form of a log, would indicate the reason for access, i.e., the legitimate interest of the person making the request, and what records are involved. The form should be simple but must elicit the name of the person making the request and agency affiliation, if any. It should also, in addition to asking what records are requested and for what purpose they are sought, contain sufficient information to indicate under what exception the records are being released. In some cases, this will be obvious from the statement of purpose for which the records are sought. Remember the log or record of access should be kept with the student's record.

An important obligation of the institution under the Act is the setting up of a hearing procedure for handling challenges to the record. Since you must institute a procedure for hearing the challenges, you should proceed to organize the procedure now so that challenges to the record may be promptly dealt with when they occur. It is a good idea to relieve any person from duty to serve on the committee who has been responsible for or directly connected with the record entry being complained of. If your committee is a standing committee and one of the members is determined to have participated in the making of the challenged entry, then simply appoint someone else to take his or her place for that particular proceeding.

As in other areas, justice delayed is justice denied, so conduct the hearing promptly. If your procedure allows for a number of appeals, such as from the committee to the Principal or President of the school, and from these to the school board, then the last step in the procedure will be the final decision of the school. At this point, the complainant has exhausted his administrative remedies and must seek recourse elsewhere. The Act does not make clear what avenues of recourse are open to the complainant. However, as the ultimate threat and punishment for violation is the cut-off of federal funds to the institution, the complainant would then take his case to the Department of Health, Education, and Welfare for their action, if any.

The final obligation of the institution is to inform students and parents of their rights under the Family Privacy Act. We have discussed how you might accomplish this. General publications such as newspapers and newsletters should be utilized for dissemination of information to former students. Individual mailings are not necessary.

The institution's obligation to itself would be the dissemination of information on the rights of students and the responsibilities of the institution within the institution. Inform your administrative staff and other affected employees of the provisions of the Act and the institution's policies for implementation of the Act. Don't allow your employees or students to obtain their information only from the local T.V. news or the public newspaper's account of the furor being created by the Act. These summaries seldom adequately inform the students or the institutions of what their rights and responsibilities are. Make sure someone within your organization who had heard of the Buckley Amendment on the Channel 5 news doesn't walk over and hand all the files over to the first parent walking through the door. Send out your own summaries and inform them where they may obtain complete copies of the Act. Keep a copy of the Act in your administrative offices for reference.

Two other forms may be of value to the school in complying with the Act. Although the student may use a statement of his own in the execution of a waiver, it would

be convenient for the school to provide a form for executing the most common of these waivers, i.e., the waiver of access to confidential communications which are requested by the student.

The other form most often used is a form used by the student in requested that information be sent to schools, agencies, employers, etc. The school probably already has this form or may not choose to utilize such a form. One reason for having such a form would be to support instances in which information not coming under any of the provided exceptions was released upon the student's request.

A final note on destruction of the files. Although you are not prohibited from destroying information which you are not required by law to keep, you may not destroy such information if a request has already been made, under the Act, for access to the information. Only confidential communications or statements entered into the file prior to January 1, 1975, may be removed, destroyed, or held inaccessible.

It is a good idea, however, to go through your files periodically and remove old confidential letters--destroying them if they are no longer necessary or returning them to their makers. The latter may be costly and may consume much time. Remember once a person has made a request to see the files, information may not be destroyed or removed from the files unless there is a waiver on file permitting the same.

The best advice with regard to implementing the Buckley Amendment and maintaining student records under any circumstances is to gather only that data which you have a legitimate need for. Too much information may be bad for your health.

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Chapter 9

AN OVERVIEW OF THE APPLICATION OF THE PUBLIC COMPETITIVE BIDDING STATUTES TO SCHOOL DISTRICTS WITHIN THE STATE OF OKLAHOMA

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Historically, school districts within the State have always been required to submit contracts to bid. In 1913 the Oklahoma Legislature passed a statute requiring all school districts contracting for expenditures in excess of $500.00 to reduce such agreements to writing, and all contracts exceeding $1,000.00 were required to be let to the lowest responsible bidder upon submission of sealed bids. Other statues were passed attendant to the early competitive bidding law; one of these is found at 70 O.S. 1971 Sections 5-124, which reads:

> "No board of education of any school district in this state shall make any contract with any of its members or with any company, individual or business concern in which any of its members shall be directly or indirectly interested. All contracts made in violation of this section shall be wholly void. A member of a board of education shall be considered to be interested in any contract made with any company, individual, or any business concern if such member of the board of education or any member of his immediate family owns any substantial interest in same."

This statute has been construed by opinion of the Attorney General to apply to depositories for school funds by which members of the board were employed or in which they were directly or indirectly interested. Other laws prescribed penalties for school boards entering into fraudulent contracts or engaging in collusive or self-dealing practices. In August, 1974 as an outgrowth of the

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legislature's desire to stop collusive practices in the awarding of state contracts, the legislature adopted the Public Competitive Bidding Act of 1974. On May 5 of this year, Governor Boren signed into law Enrolled House Bill No. 1251, an act amending the initial Public Competitive Bidding Act of 1974. Under the terms of the Act and the amendment the "State of Oklahoma, any county, city, town, school district or other political subdivision of the State" is required to submit all public improvement contracts exceeding $2,500.00 to competitive bidding. This Act, insofar as school districts are concerned, supercedes all prior statutory provisions requiring competitive bidding. The Act defines what public improvements are subject to competitive bidding. The 1975 Amendment adds Subsection 5 to existing Section 102 entitiled "Definitions", and reads:

> "'Public improvement' means any beneficial or valuable change or addition, betterment, enhancement or amelioration of or upon any real property, or interest therein, belonging to a public agency, intended to enhance its value, beauty or utility or to adapt it to new or further purposes. The term does not include the direct purchases of materials, equipment or supplies by a public agency."

It is important to note that the purchase of transportation equipment by school districts within the State of Oklahoma is controlled by the terms of 70 O.S. 1971 Sections 9-109. Under the general terms of the Public Competitive Bidding Act buses or transportation equipment would not be included within the prescribed definition of "Public improvement". Moreover, the purchase of transportation equipment under provision of 70 O.S. 1971 Sections 9-109 is to be done at competitive bid. I don't believe the more stringent requirements

of the Act would apply to the purchase of transportation equipment, through the application of the terms of the Act.

Section 103 of the Act provides that all public construction contracts shall be let and awarded to the lowest bidder, and provides further, that no work shall be commenced until a written contract is executed and all required bonds and insurance have been tendered by the contractor. As prescribed in Sections 111 and 113 of the Act, the contract is to be awarded within thirty(30) days of receipt of bids; and thereafter, within 60 days, the contractor is to provide a bond equal to the contract price and a bond to cover the district against defective workmanship and materials for a period of one year after acceptance of the project. The second surety bond is also to be written in an amount equal to the contract price. Also the contractor is to maintain public liability or workmen's compensation insurance during the construction period in a "reasonable amount".

Section 104 of the Act was amended to prescribe the procedures to be followed by the district in soliciting and receiving bids. Subsection 1 of 104 provides for mailing "first class" notice of bidding at least twenty (20) days prior to the time set for opening bids. This mailing should be directed to all known prospective bidders who have indicated, in writing, their interest in bidding within the preceding twelve(12) months of the date of opening bids. Subsection 2 provides that notice of bidding shall appear in a newspaper of general circulation and published in the county where the work is to be done in two consecutive weekly issues of said paper, with

the first publication thereof appearing at least twenty (20) days prior to the date set for opening of bids. Subsection 3 provides that if the contract amount is to exceed $50,000.00 then notice thereof shall be sent to a trade or construction publication; however, this section is qualified to provide that upon receipt the trade or construction publication is not required to make publication of the notice.

Section 105 of the Act prescribes what information is to appear in the Bid Notice. The notice is to detail the proposed construction in order that any prospective bidder shall know exactly what their obligation will be. In most instances this will entail making reference to additional bidding documents kept on file with the district. This is done for the reason that most construction will require extensive delineation of specifications. The notice shall also specify the name of the officer, agent or employee of the district from whom a complete set of bidding documents can be obtained. The bid notice should specify particularly the office location, address and name of the party to be contacted to obtain all necessary information, together with the date, time and place of opening the sealed bids. Also it is important to note that the name of the district official and office location to which the sealed bids should be submitted is specified in the Bid Notice.

Section 106 of the Act provides that at least one complete copy

of all bidding documents shall be on file with the district at least 20 days prior to the date set for the bids. This section also directs the district to have a sufficient number of bidding documents available for prospective bidders and provides further that the district can charge a reasonable fee for providing these documents.

Section 107 of the Act provides that each bidder is to accompany his bid by a certified or cashier's check or bid bond equal to five (5%) per cent of the bid. This good faith deposit is to be maintained by the district as a guaranty. Section 107 prescribes the measure of damages due the district if a bidder defaults in the performance of a contract. In brief, the statute provides that the defaulting contractor will cover the cost of republication of notice and the difference between the low bid and the subsequent bid received in connection with the same project. The good faith deposit is to be returned to the successful bidder upon execution and delivery of the executed contract and required bonds and insurance, heretofore discussed. In this connection, although it is not mentioned in the section prescribing the elements for the Bid Notice, it is suggested that the 5% good faith requirement be delineated in the text of the Bid Notice.

Section 108 of the Act prescribes that each bidder shall file with his bid an affidavit disclosing or disavowing any prior relationship between the bidder and the architect, engineer or

other parties to the project. In substance, the section provides that any arrangement, agreement, formal or informal, existing between the bidder, as an agent of any bidding company, or as an individual, to any of the architects or engineers presently involved in the project shall be disclosed. These disclosures are to be made even if the relationships involve matters other than construction. If there is no business relationship between the bidding company or any individuals of the firms involved then same should also be so stated in an affidavit accompanying the bid.

Section 109 of the Act provides that any bid received by the district more than 96 hours (excluding weekends and holidays) before the time set for the opening of bids or, of course, any bid received after the time set for the opening of bids, shall not be considered by the district.

Section 110 of the Act provides that all bids shall be opened at the time and place and in the manner prescribed by the Official Bid Notice. Further, such bid opening shall be open to the public and to all bidders.

Section 111 of the Act has not been amended and provides that the contract is to be awarded to the lowest responsible bidder within thirty (30) days after the opening of bids. There is, however, a provision for an extension of time of not to exceed fifteen (15) days where only state and local funds are involved. An additional ninety (90) days can be granted for awarding contracts

in those instances where Federal monies are to be utilized.

Section 112 of the Act deals with the disclosure of all contracts, bonds, insurance policies and attendant documents to the public, if so desired. The section stipulates that all bids, successful and unsuccessful shall be maintained in the Board of Education Office for a period of five (5) years from the date of opening the bids, or three (3) years from the date of completion of the contract, whichever is longer.

Section 113 of the Act deals with the execution of the Contract. There is some question as to what the legislature contemplated by amending Section 113. When does the 60 day period toll? Is it from the date the contract is awarded, as in the prior Act; or is it from the date of bid opening? In consulting with the Attorney General's office, I am of the opinion that the only feasible interpretation of words "within such period of time", appearing in subsection A of 113, must be the award date. In short, the sequence must be (1) receive bids, (2) award contract within 30 days, (3) execute contract within 60 day period from date of awarding contract or such lesser time as specified in the Bid Notice. Moreover, it seems the Bid Notice form as referenced in Section 104 should necessarily recite a date for contract execution. Section 113 goes on to require that upon the date the contract is to be executed the contractor shall furnish:

1) The Bond required by 61 O.S. §1, whereby the contractor

guarantees payment of all subcontractors and attendant workmen or materialmen claims against the project. In this connection a contractor may perfect a lien or security interest in a project within 90 days after work was last performed. Conceivably, a contractor could file a materialmen or mechanic's lien against District property after the project was received by the District. Therefore, it is imperative that the duration of the Bond be current for that period of 90 days after acceptance (42 O.S. 1971 §143).

2) A bond to insure the proper and prompt completion of work in accordance with the contract.

3) A bond insuring against defective workmanship and materials for a period of one (1) year after acceptance of the project. All of these surety bonds are to be written in the amount of the contract.

Also the contractor is to provide at that time evidence of Public liability and workmen's compensation insurance for the period of construction. The policy is to be written for a "reasonable amount". The district may require the contractor to name the district and its architect and/or engineers as additional insureds under the policy. However, this is to be specified beforehand in the Bid Notice if the district is desirous of the additional coverage.

A problem with the 1974 Act prior to Amendment was that there

was initially required a surety bond against defective material and workmanship for a period of three years, after acceptance of the project. The amendment to Section 113 not only limits this policy to one year, but allows the district to amend outstanding contracts to reflect the one year period. However, I would think this advisable only if some consideration was surrendered to the district in response to the decrease in surety bond expense to the contractor.

Section 114 of the Act deals with conflicts of interest, namely that the Superintendent of Schools or any member of the School Board shall not authorize the execution of a public construction contract with their relatives within the third degree of consanguinity or affinity. Contracts falling within this category are forbidden even if the relationship exists through stock ownership, partnership interests or otherwise. The penalties for violation of this provision of this provision are that the contract will be declared void and any person who willfully violates this restriction shall be guilty of a felony and shall be subject to removal from office.

Section 115 of the Act was obviously passed to prohibit the practice of collusion among bidders on public contracts. Past experiences at the state level have shown that collusion among bidders has had the effect of price fixing and thereby prevented public agencies from receiving the lowest possible bid. In effect the Act provides that if any bidders or prospective bidders enter

a bid appearing competitive, however known to both parties to be above that of the preconceived winner, then both parties are guilty of a felony. In attempting to enforce the provisions of this section each bidder is to accompany his bid with a sworn statement that he has not been a party to such a collusive agreement, as required by Section 108. It is debatable how effective this provision will be, but it adds the crime of perjury to the criminal collusion.

Section 116 of the Act provides simply that the district shall conduct the bid proceedings fairly and without prejudice to any prospective bidder. For instance there shall be no disclosure of the terms of the bid or the bid notice prior to the time that the bid notice and specifications are made available to the general bidding public. Providing bid specifications are changed it is required that the alterations be made available to all prospective bidders with equal dispatch. Also it is provided that no person or representative of the district shall do anything to impede free distribution of the information necessary to the completion of a bid on the subject project. This, once again, is simply to insure fair play between the district and prospective bidders.

Section 117 of the Act deals with the circumstances whereby the district may award the bid to someone other than the lowest bidder. This situation could arise when there is a disparity in the bid from the bid specifications, or if the district is dissatisfied with

the general qualifications of the lowest bidder. In that circumstance the district is required to issue a publicized statement setting forth the reason that the lowest bid was rejected and the reason that the second bid was accepted. Further, the statement shall be placed on file and open to the public for inspection as with all bid notices and unsuccessful bids as required under the terms of the Act.

Section 118 of the Act deals with pre-qualification of bidders. Projects requiring extensive expertise and experience may be made subject to pre-qualification. This means, in essence, that prospective bidders may be required to submit evidence that they are qualified and able in every respect to perform the project in a good and workman-like manner. If pre-qualification is required, it is important to note that notice of pre-qualification must be equally and uniformly applied to the bidding public. Some examples of pre-qualification information are: (1) what projects of equal magnitude and cost have been undertaken and completed by the prospective bidder, (2) a financial statement compiled by the prospective bidder showing that he has the necessary credit line and resources to undertake and complete the project and (3) references of completed projects.

Section 119 of the Act deals with rejection of bids. It has long been the practice within the State of Oklahoma that any district, when it deems it advisable for the general public good,

is empowered to reject any and all bids submitted.

Section 120 of the Act deals with assignment of contracts. No contract can be assigned by a successful bidder unless prior written consent is received from the district. In no event shall a contract be assigned to a bidder who was adjudged to be an unacceptable bidder when bids were first received. This insures that a bidder unacceptable in the first instance cannot do indirectly what he was prevented from doing directly.

Section 121 of the Act deals with Change Orders. Much controversy has arisen in recent years concerning the practice of change orders on government contracts. There has been widespread abuse in this area. The Legislature, in an attempt to remedy this situation, has placed percentage and dollar limitations on the amount of change orders that can be authorized on any specific project. The amended statute provides that change orders or addendums to public construction contracts of $1,000,000 or less shall not exceed 15% of the cumulative total of the original contract amount. Change orders or addendums to public construction contracts of over $1,000,000 shall not exceed 10% of the cumulative total of the original contract amount. The law provides that any change order or cumulative change order which exceeds these limits shall require re-advertising for bids on the part of the district. You will please note that this amendment provides that a series of change orders aggregating a percentage larger than that prescribed

will not fall within the exception of the 15% or 10% rule. It is also required that each change order presented to the district shall be approved by a vote of the board of education; and further, the reasons therefore shall be recorded in the permanent records of that district. In this connection I believe the statute does not require publication of the reason for or the amount of a change order. However, in an abundance of caution it might be advisable in particular situations for a school board to publish the change order, the need therefore, and the amount. I hasten to add that this should be determined on a project by project basis. When a change order is submitted by the district and agreed upon by the contractor, the resulting contract should reflect the following:

1. All materials with cost per item. In this connection the contractor should list the materials necessary to effect the change order with the cost per unit.
2. An itemization of all labor with a delineation of the number of hours necessitated by the change order and the cost charged per hour.
3. An itemization of the increased insurance costs, surety bond costs, social security, taxes, workmen's compensation and other costs attendant to effecting the change order.
4. The contractor should disclose the dollar profit

margin.

There are exceptions to the change order restrictions. If the contract is bid on a "unit basis" and the change order can be computed exactly on the unit price basis, as awarded in the first instance, then such a change order will not be subject to the foregoing restrictions. Also, alternates or add items reserved as options to the district under the initial bid made under the provisions of the Competitive Bidding Act shall not be construed as change orders under the provisions of the law. Therefore, the items can be added as options. In effect, the two exceptions construed to be alterations from the original contract cost and specifications would not be construed as change orders at all, but merely carrying out the terms of the original contract.

Section 122 of the Act deals with lawsuits to enjoin the enforcement of the contracts entered into in violation of the provisions of this Act. It has always been an accepted interpretation of the law that any taxpayer had sufficient standing to seek out an injunction to prohibit the enforcement of a contract illegally entered into by any public agency. However, this general understanding of the common law has been codified in this section of the statues with a ten day limitation. In essence this means that any unsuccessful bidder with a proper grievance or any taxpayer can bring an action to enjoin the performance of a contract proven to be in violation

of the Act of the Competitive Bidding Law. I question the legality of imposing a 10 day contestability limitation on an illegal contract.

Section 123 of the Act deals with certification of the supervisor of the project, that all work and materials furnished by the contractor are and have been performed in accordance with the terms of the contract. At the time or times that the contractor submits statements or invoices for payment they shall be accompanied, and each of them, by a sworn statement of the architect, engineer or project supervisor stating that the work has been done and completed in conformance with the specifications of the contract. This does estop the district from later bringing a lawsuit for nonconformance.

Section 124 deals with the inspection of the project by the district prior to acceptance. This right must be reserved to the district pursuant to statute.

Section 125 is restricted to state contracts.

Section 126 of the Act does not prohibit the district from doing public construction work on a force account basis. Under the provisions of Section 102 (5) materials may be purchased outside the terms of the Act for labor to be undertaken by the salaried staff of the District. However, it is questionable whether any extensive construction could be performed by the custodial labor force.

Section 127 of the Act applies to public trust financing and is

not germane to school districts.

Section 128 of the Act deals with insurance against fire and the elements. This is not mandatory; however, the district is authorized to require the contractor to carry the appropriate fire and damage insurance during the period of construction. As stated in the statute it would be advisable to cover the district's incremental equity in the project during the construction time. For instance, if a third of the project is completed and a third of the contract price has been submitted to the contractor, the insurance written for the protection of the district should be in the amount of one-third of the contract price.

Section 129 of the Act exempts all contracts awarded and begun before the effective date, August 1, 1974.

Section 130 of the Act has been amended to provide that upon an affirmative vote of two thirds of the members of the school board, an emergency may be declared and the compliance with reference to notice and bids for improvement contracts shall not apply. Also, it is provided in this amendment that upon two thirds vote of the members of the school board they may delegate the authority for suspension of the notice and bid requirements to the chief administrative officer, i.e. the superintendant of schools. HOWEVER, IN NO EVENT, shall these provisions be suspended with respect to any contract exceeding $25,000; PROVIDED FURTHER,

that the superintendant is required, if an emergency is declared, to advise the school board within (10) ten days of the reason and necessity for such action. An emergency can only be declared in that situation where a sudden unexpected happening or unforeseen occurence or condition and situation exists whereby the public health or safety is in danger. It is also required that when an emergency is declared and announced to the school board, the same shall be read into the official minutes of the board.

With respect to Section 130 of the Act except in those extreme circumstances where the function of the district cannot be performed unless an emergency is declared and contracts let to remedy a condition or situation existing which affects the public health or safety, the section will not be operative.

Section 131 of the Act deals with the splitting of contracts. This provision renders it impossible for any ingenious contractor to split bids for projects to be performed in order that they fall within the $2500 limitation. Also, it prohibits partial contracts involving less than $2500. In other words, total project costs exceeding $2500 must be let in conformance with the terms of the Act.

Section 132 of the Act provides that the Attorney General shall prepare the forms to be used by the school board in complying with the provisions of the law. In this connection I have checked with the Attorney General's office and they were recently made aware

of the Amendments to the law. They are presently preparing forms in order to comply with the terms of Section 132.

Section 133 of the Act provides that any Charter, statute or by-law of any governmental body containing standards or procedures more stringent than those imposed by the terms of the Act shall prevail and be followed.

Section 132 of the Act requires that any issuer of insurance or surety bonds as required by the law, shall be licensed to do business within the State of Oklahoma. In this connection I would think it would be a responsibility of the Board or the school superintendant to make an inquiry of the state insurance board to see if the carriers presented for acceptance are in good standing within the State of Oklahoma. Also in connection with Section 134 it is emphasized that the school board or any of its officers or agents shall in no manner or respect attempt to influence any prospective bidder, contractor or subcontractor to obtain insurance from any particular insurance or surety company, agent or broker. Any provision in a bid notice requiring a particular surety or insurance company shall be stricken as void under the terms of the amendment and any person exerting influence to require the purchase of insurance from any particular company or agent is guilty of a misdemeanor hereunder.

There are additional sections to the law that have not been assigned section numbers and to date have not been codified into

the Oklahoma statutes. It is provided that if Federal funds are made available that the competitive bidding requirements imposed by the U.S. government shall supercede and take precedence over the provisions of this act. For example, in those districts receiving Federal Impact Monies, if the Department of Health, Education and Welfare requires bids to be let on a competitive bidding basis, then the terms of the Federal law would control and take precedence over the State law.

There is also contained in the amendments to the 1974 Act the general severability provisions and emergency provisions whereby the law because effective on the date of signing, June 5, 1975.

ED120953

Chapter 10

NONDISCRIMINATION ON BASIS OF SEX .... (TITLE IX)

In June 1972, the Congress passed Title IX of the Education Amendments, a law which affects virtually every educational institution in the country. The law prohibits discrimination by sex in educational programs that receive Federal money.

The spirit of the law is reflected in this opening statement: Under Title IX, "No person in the United States shall on the basis of sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . ."

The law was originally introduced in 1971 as an amendment to the Civil Rights Act of 1964. Following Congressional debate and changes, the law, signed on June 23, 1972, emerged as Title IX of the education Amendments of 1972, a broad-scale bill covering a range of Federal assistance programs.

During the deliberations on the new law, individuals and organizations testified to existing conditions which they believed made the passage of such a law essential.

Examples:

--Testimony indicated that girls were frequently denied the opportunity to enroll in traditionally male courses such as industrial arts and boys the opportunity to enroll in courses such as home economics because of overtly discriminatory secondary school policies. Even if such course enrollment restrictions were not present and a student interest

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existed, boys and girls would be counseled to enroll in traditionally male and female career development courses.

--Evidence concerning physical education activities indicated that women and girls were shortchanged. A school in a Midwestern district, for example, operated a program for girls that was substantially inferior to that operated for boys. In another case, rules in one State forced a high school to deny its best tennis player both coaching and a chance to compete on the school's tennis team because that athlete was female.

--A national survey conducted in 1970-71 by the National Education Association showed that while women constituted 67 percent of all public school teachers, they accounted for only 15 percent of the principals and 0.6 percent of the superintendents. Most of the women holding administrative positions were confined to the elementary school level. Specifically, women represented 19 percent of the nation's elementary school principals; but, only 3.5 percent of the junior high principals and 3 percent at the senior high level.

--A study by the National Center for Educational Statistics revealed that as of 1973, women college faculty members received average salaries almost $2,500 less than those of their male counterparts. The study also showed that 9.7 percent of female faculty members had achieved the rank of professor, contrasted with 25.5 percent of males.

DEVELOPMENT OF REGULATIONS

This was the setting under which HEW's Office for Civil Rights drew up the proposed regulation to carry out the nondiscrimination principles of Title IX. It applied, with a few specific exceptions, to all aspects of education programs or activities carried on by Federally assisted school districts, institutions of higher learning, or others receiving Federal financial aid. Generally, it covered admissions, treatment of students and employment.

On June 20, 1974, a proposed regulation was published in the

Federal Register and public comment was invited. To assist the public in understanding the proposed regulations, representatives from the Office for Civil Rights conducted extensive briefings in 12 major cities throughout the country.

From the publication of the proposed regulations in June to the close of the comment period in October, HEW received nearly 10,000 public comments. The heaviest volume of comment came in six areas on the following issues:

--sex discrimination in sports and athletic programs,

--coeducational physical education classes,

--sex stereotyping in textbooks,

--the possible impact of the law on fraternities and sororities,

--scholarships, and

--employment issues.

Drafted on the basis of the proposed regulation issued in June of 1974 and reflecting a number of changes suggested by concerned citizens, organizations and institutions, the final regulation has been signed by the President as required by the statute. Effective July 21, 1975, the final regulation prohibits, with certain exceptions, sex discrimination in education programs or activities which receive Federal financial assistance.

The regulation will be administered by the Office for Civil Rights of the U.S. Department of Health, Education and welfare.

45 C.F.R. PART 86:

SUBSTANTIVE PROVISIONS

The final regulation covers the following areas with respect to recipients of Federal financial assistance for educational programs or activities:

Coverage;

Admission of students;

Treatment of students;

Employment; and

Procedures.

COVERAGE

Except for the specific limited exemptions set forth below, the final regulation applies to all aspects of all education programs or activities of a school district, institution of higher education, or other entity which receives Federal funds for any of those programs.

With respect to admissions to educational institutions, the final regulation applies only to: vocational, professional and graduate schools and to institutions of public undergraduate education (except those few public undergraduate schools which have been traditionally and continually single sex).

The final regulation does not cover admission to: recipient pre-schools, elementary, and secondary schools (except to vocational schools), private undergraduate institutions and, as noted above,

to those few public undergraduate educational institutions that have been traditionally and continually single sex.

Even institutions whose admissions are exempt from coverage must treat all students nondiscriminatorily once they have admitted members of both sexes.

Military institutions at both the secondary and higher education level are entirely exempt from coverage under Title IX. Practices in schools run by religious organizations also are exempt to the extent compliance would be inconsistent with religious tenets. Thus, for example, if a religious tenet relates only to employment, the institutions would still be prohibited from discrimination against students.

ADMISSIONS

The final regulation covers recruitment as well as all admissions policies and practices of those recipients not exempt as to admissions. It includes specific prohibitions of sex discrimination through separate ranking of applicants, application of sex-based quotas, administration of sex-biased tests or selection criteria, and granting of preference to applicants based on their attendance at particular institutions if the preference results in sex discrimination. The final regulation also forbids application in a discriminatory manner of rules concerning marital or parental status, and prohibits discrimination on the basis of pregnancy and related conditions, providing that recipients shall treat

pregnancy and disabilities related to pregnancy in the same way as any other temporary disability or physical condition.

Generally, comparable efforts must be made by recipients to recruit members of each sex. Where discrimination previously existed, additional recruitment efforts directed primarily toward members of one sex must be undertaken to remedy the effects of the past discrimination.

EXAMPLES -- ADMISSIONS

--An institution whose admissions are covered by the regulation may not set quotas on the number of men or women who will be admitted. Thus, a medical school may not set such quotas, although a private undergraduate school may do so.

--An institution whose admissions are covered may not set different standards of admission for one sex than for the other. Thus, a graduate school may not require a lower grade point average for men than for women, although a private undergraduate school may do so.

--An institution of graduate, professional or vocational education which prior to enactment of Title IX had limited its admissions primarily to members of one sex must undertake special efforts to notify and recruit members of the sex previously barred or restricted in order to overcome the effects of past discrimination. Thus, a professional school which previously purposely limited the proportion of females in each entering class to approximately 15% would be required to initiate special recruitment efforts to attract qualified female students. A similar institution whose admissions had not been subject to such a quota arrangement, but had admitted students without discrimination on the basis of sex, would be required only to make comparable efforts to attract members of each sex.

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TREATMENT

As stated before, although some schools are exempt from Title

IX with regard to admissions, all schools must treat their admitted students without discrimination on the basis of sex. With regard to treatment of students, therefore, the final regulation applies to recipient pre-schools, elementary and secondary schools, vocational schools, colleges, and universities at the undergraduate, graduate and professional levels, as well as to other agencies, organizations and persons which receive Federal funds for educational programs and activities.

Specifically, the treatment sections of the regulation cover the following areas:

(1) Access to and participation in course offerings and extracurricular activities, including campus organizations and competitive athletics;

(2) Eligibility for and receipt or enjoyment of benefits, services, and financial aid;

(3) Use of facilities, and comparability of, availability of, and rules concerning housing (except that single-sex housing is permissible).

The final regulation incorporates a Congressional exemption enacted into law in 1974, for the membership practices of social fraternities and sororities at the postsecondary level, the Boy Scouts, Girl Scouts, Campfire Girls, Y.W.C.A., Y.M.C.A., and certain voluntary youth services organizations. Thus, a recipient

educational institution may provide assistance to such specifically exempted single-sex organizations without violating the non-discrimination requirements of the statute.

Classes in health education, if offered, may not be conducted separately on the basis of sex, but the final regulation allows separate sessions for boys and girls at the elementary and secondary school level during times when the materials and discussion deal exclusively with human sexuality. There is, of course, nothing in the law or the final regulation requiring schools to conduct sex education classes. This is a matter for local determination.

Physical Education

While generally prohibiting sex segregated physical education classes, the final regulations do allow separation by sex in physical education classes during competition in wrestling, boxing, basketball, football, and other sports involving bodily contact. Schools must comply fully with the regulation with respect to physical education as soon as possible. In the case of physical education classes elementary schools must be in full compliance no later than one year from the effective date of the regulation. In the case of physical education classes at the secondary and postsecondary level, schools must be in compliance no later than three years from the effective date of the regulation. During these periods, while making necessary adjustments, any physical education classes or activities which are separate, must be comparable for each sex.

Athletics

Where selection is based on competitive skill or the activity involved is a contact sport, athletics may be provided through separate teams for males and females or through a single team open to both sexes. If separate teams are offered, a recipient institution may not discriminate on the basis of sex in provision of necessary equipment or supplies, or in any other way, but equal aggregate expenditures are not required. The goal of the final regulation in the area of athletics is to secure equal opportunity for males and females while allowing schools and colleges flexibility in determining how best to provide such opportunity.

In determining whether equal opportunities are available, such factors as these will be considered:

--whether the sports selected reflect the interests and abilities of both sexes;

--provision of supplies and equipment;

--game and practice schedules;

--travel and per diem allowances;

--coaching and academic tutoring opportunities and the assignment and pay of the coaches and tutors;

--locker rooms, practice and competitive facilities;

--medical and training services;

--housing and dining facilities and services;

--publicity.

Where a team in a non-contact sport, the membership of which

is based on skill, is offered for members of one sex and not for members of the other sex, and athletic opportunities for the sex for whom no team is available have previously been limited, individuals of that sex must be allowed to compete for the team offered. For example, if tennis is offered for men and not for women and a woman wishes to play on the tennis team, if women's sports have previously been limited at the institution in question, that woman may compete for a place on the men's team. However, this provision does not alter the responsibility which a recipient has with regard to the provision of equal opportunity. Recipients are requested to "select sports and levels of competition which effectively accommodate the interests and abilities of members of both sexes." Thus, an institution would be required to provide separate teams for men and women, in situations where the provision of only one team would not "accommodate the interests and abilities of members of both sexes." This provision applies whether sports are contact or noncontact.

In the case of athletics, like physical education, elementary schools will have up to a year from the effective date of the regulations to comply, and secondary and postsecondary schools will have up to three years.

Organizations

Generally, a recipient may not, in connection with its education program or activity, provide significant assistance to any

organization, agency or person which discriminates on the basis of sex. Such forms of assistance to discriminatory groups as faculty sponsors, facilities, administrative staff, etc., may, on a case-by-case basis, be determined to be significant enough to render the organization subject to the non-discrimination requirements of the regulation. As noted, previously, the final regulation incorporates an exemption for the membership practices of social fraternities and sororities at the postsecondary level, the Boy Scouts, Girl Scouts, Campfire Girls, Y.W.C.A., Y.M.C.A., and certain voluntary youth service organizations. However, recipients continue to be prohibited from providing significant assistance to professional or honorary fraternal organizations.

Benefits, Services, and Financial Aid

Generally, a recipient subject to the regulation is prohibited from discriminating in making available, in connection with its educational program or activity, any benefits, services, or financial aid although "pooling" of certain sex-restrictive scholarships is permitted. Benefits and services include medical and insurance policies and services for students, counseling, and assistance in obtaining employment. Financial aid includes scholarships, loans, grants-in-aid and work-study programs.

Facilities

Generally, all facilities must be available without discrimination on the basis of sex. As provided in the statute, however,

the regulation permits separate housing based on sex as well as separate locker rooms, toliets and showers. A recipient may not make available to members of one sex locker rooms, toilets and showers which are not comparable to those provided to members of the other sex. With respect to housing, the regulation requires comparability as to the facilities themselves and non-discrimination as to their availability and as to the rules under which they are operated, including fees, hours, and requirements for off-campus housing.

Curricular Materials

The final regulation includes a provision which states that "nothing in this regulation shall be interpreted as requiring or prohibiting or abridging in any way the use of particular textbooks or curricular materials." As noted in the Preamble to the final regulation, the Department recognizes that sex stereotyping in curricula is a serious matter, but notes that the imposition of restrictions in this area would inevitably limit communication and would thrust the Department into the role of Federal censor. The Department assumes that recipients will deal with this problem in the exercise of their general authority and control over curricula and course content. For its part, the Department will increase its efforts, through the Office of Education, to provide research, assistance, and guidance to local educational agencies in eliminating sex bias

from curricula and educational material.

EXAMPLES--TREATMENT

--A recipient school district may not require boys to take shop and girls to take home economics, exclude girls from shop and boys from home economics, or operate separate home economics or shop classes for boys and girls.

--A recipient vocational or other educational institution may not state in its catalog or elsewhere that a course is solely or primarily for persons of one sex.

--Male and female students shall not be discriminated against on the basis of sex in counseling. Generally, a counselor may not use different materials in testing or guidance based on the student's sex unless this is essential in eliminating bias and then, provided the materials cover the same occupations and interest areas. Also, if a school finds that a class contains a disproportionate number of students of one sex, it must be sure that this disproportion is not the result of sex-biased counseling or materials.

--A recipient school district may not require segregation of boys into one health, physical education, or other class, and segregation of girls into another such class.

--Where men are afforded opportunities for athletic scholarships, the final regulation requires that women also be afforded these opportunities.

Specifically, the regulation provides: "To the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics."

--Locker rooms, showers, and other facilities provided for women must be comparable to those provided for men.

--A recipient educational institution would be prohibited from providing financial support for an all-female hiking club, an all-male language club, or a single-sex honorary society. However, a non-exempt organization whose membership was restricted to members of one sex could adhere to its restrictive policies, and operate on the campus of a recipient university, if it received no assistance from the university.

--Male and female students must be eligible for benefits, services and financial aid without discrimination on the basis of sex. Where colleges administer scholarships designated exclusively for one sex or the other, the scholarship recipients should initially be chosen without regard to sex. Then when the time comes to award the money, sex may be taken into consideration in matching available monies to the students chosen. No person may be denied financial aid merely because no aid for his or her sex is available. Prizes, awards and scholarships not established under a will or trust must be administered without regard to sex.

--An institution which has one swimming pool must provide for use by members of both sexes on a non-discriminatory basis.

--An institution which lists off-campus housing for its students must ensure that, in the aggregate, comparable off-campus housing is available in equal proportion to those members of each sex expressing an interest in it.

--Administration by a recipient institution of different rules based on sex regarding eligibility for living off-campus, curfews, availability of cleaning and janitorial assistance, etc. would violate the regulation.

EMPLOYMENT

All employees in all institutions are covered, both full- and part-time, except those in military schools, and in religious schools, to the extent compliance would be inconsistent with the controlling religious tenets. Employment coverage under the proposed regulation generally follows the policies of the Equal Employment Opportunity Commission and the Department of Labor's Office of Federal Contract Compliance. Specifically, the proposal covers:

(a) employment criteria

(b) recruitment

(c) compensation

(d) job classification and structure

(e) fringe benefits

(f) marital or parental status

(g) effect of state or local law or other requirements

(h) advertising

(i) pre-employment inquiries

(j) sex as a bona fide occupational qualification

As to fringe benefits, employers must provide either equal contributions to or equal benefits under pension plans for male and female employees; as to pregnancy, leave and fringe benefits to pregnant employees must be offered in the same manner as are leave and benefits to temporarily disabled employees.

EXAMPLES--EMPLOYMENT

--A recipient employer may not recruit and hire employees solely from discriminatory sources in connection with its educational program or activity.

--A recipient employer must provide equal pay to male and female employees performing the same work in connection with its educational program or activity.

--A recipient employer may not discriminate against or exclude from employment any employee or applicant for employment on the basis of pregnancy or related conditions.

ENFORCEMENT PROCEDURE

The final regulation incorporates by reference a procedural section which includes among other things, compliance reviews, access to information, administrative termination procedures (hearings), decision, administrative and judicial review and post-termination proceedings.

Should a violation of the statute occur, the Department is obligated to seek voluntary compliance. If attempts to secure voluntary compliance fail, enforcement action may be taken:

(1) by administrative proceeding to terminate Federal financial assistance until the institution ceases its discriminatory conduct; or

(2) by other means authorized by law, including referral of the matter to the Department of Justice with a recommendation for initiation of court proceedings. Under the latter mode of enforcement, the recipient's Federal funds are not jeopardized.

In addition to the specific requirements of Title IX, i.e., reports, surveys, appointment of coordinator, development of grievance procedure and possible "affirmative action" programs, the institution should first review all rules, regulations, policies, etc. for discriminatory language. Such information as job descriptions, behavorial codes and employment procedures should carefully be reviewed and any discrimination found accordingly removed.

The institution must begin to compile statistical information in regard to current employees and their respective job classifications. Every classification must be justified by documentation. All current forms, applications, etc. must be reviewed and all language referring to sex and marital status removed. The Sports Survey must be prepared and readied for distribution when school commences in the fall. General information concerning Title IX and your "grievance procedure" must be published and

detailed to all patrons, parents, students and employees.

If any discrimination is found, the institution might consider preparing an "affirmative action" program instead of waiting for H.E.W. to order you to do so. Such obviously should be included in your first annual report due July 21, 1976.

Certainly, all Board members and current employees should be fully briefed as to Title IX and its requirements.